Questioning the Question-Proof Inmate: Defining *Miranda* Custody for Incarcerated Suspects

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Some lower courts have held that when a defendant who invoked his Fifth Amendment right to counsel during police investigation is convicted of a crime and goes to jail, that invocation renders the prisoner question-proof for the entire period of his incarceration. These courts view continuous incarceration as continuous Miranda *custody. As a result, police may not question the prisoner about any crime, no matter how much time has passed since the prisoner's invocation, even if the subject matter of the questioning is totally unrelated to the crime for which the prisoner is serving a sentence. The United States Supreme Court has recently expressed an interest in considering whether these prisoners are really question-proof.*

Professor Magid argues that this holding is both unnecessary and unwise. Under a more sensible approach, incarceration is not necessarily equivalent to Miranda *custody. This approach strikes the proper balance between individual rights and the law enforcement needs of society. A prisoner is in* Miranda *custody only when some additional restraint, not normally encountered in prison life, is imposed upon him by investigators. Under this view, police would be permitted to approach the prisoner and question him, but only if they first provide the* Miranda *warnings once again.*

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I. INTRODUCTION

Miranda v. Arizona[1] has become a maze[2] in which police officers, lawyers, and judges are left to wonder why *Miranda* places flexible restraints on some paths of police investigation but absolute roadblocks on others.[3] This Article examines one vexing area where the prevailing interpretation of one of *Miranda*'s bright-line tests has substantially constrained crime investigation efforts.[4] It considers whether officials investigating a crime may question a suspect who is incarcerated on an unrelated matter and who happened to have invoked the right to counsel when questioned about the crime for which he is now serving a sentence.[5] In concluding that such an inmate cannot be approached without counsel, courts have taken an excessively broad view of *Miranda*'s limits on the interrogation of prison inmates.

The United States Supreme Court recognized the significance of this issue

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[1] 384 U.S. 436 (1966).

[2] *Miranda* has also been described as a "prickly thicket." Stephen J. Markman, Miranda v. Arizona: *A Historical Perspective*, 24 AM. CRIM. L. REV. 193, 211 (1986); *see also* Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2629 (1997) ("No one really knows what *Miranda* means.").

[3] *Compare* Michigan v. Mosley, 423 U.S. 96, 104–05 (1975) (permitting resumption of questioning in as little as two hours after an invocation of the right to counsel), *with* Minnick v. Mississippi, 498 U.S. 146, 153 (1990) (prohibiting resumption of questioning after an invocation of the right to counsel even if defendant meets with counsel as requested).

[4] Nearly every part of the *Miranda* decision has proved controversial. *See* Matthew Lippman, Miranda v. Arizona: *Twenty Years Later*, 9 CRIM. JUST. J. 241, 241 (1987) (describing *Miranda* as "one of the most controversial criminal procedure cases in American history"); Markman, *supra* note 2, at 210 ("*Miranda* provoked a storm of controversy."); Stephen A. Saltzburg, Miranda v. Arizona *Revisited: Constitutional Law or Judicial Fiat*, 26 WASHBURN L.J. 1, 1 (1986) ("It would be difficult to find a constitutional decision involving the criminal law that was more controversial at the moment it was decided than was *Miranda v. Arizona*.").

[5] Law enforcement officers often find that their prime suspect is already incarcerated on some unrelated matter. Some of the most notorious crimes have been solved by interrogating a suspect already being held for or serving a sentence for some other crime. *See, e.g.*, Bundy v. State, 455 So. 2d 330, 336 (Fla. 1984) (serial murderer Ted Bundy was originally arrested for car theft). Before *Minnick v. Mississippi*, 498 U.S. 146 (1990), many courts permitted such interrogation by finding that once a defendant had met with the counsel he requested, his invocation of the right to counsel did not bar officials from approaching him for questioning about a new crime. *See, e.g.*, State v. Newton, 682 P.2d 295, 297–98 (Utah 1984). In *Minnick*, however, the Court created a much greater obstacle for officials by finding that a defendant who remained in custody could not be approached for questioning about any matter even after he had met with counsel as requested. *See Minnick*, 498 U.S. at 153.

when it granted a writ of certiorari in *United States v. Green*[6] in 1992. After being arrested for a relatively minor drug offense, Lowell Green invoked his Fifth Amendment right to counsel. Thus, he was not questioned about the drug offense. Green was detained until his trial and conviction for the drug offense. After sentencing, he entered the general prison[7] population. Several months later, Green became a suspect in a far more serious matter—a murder unrelated to the drug offense. After the police approached Green in prison and obtained a waiver of his *Miranda* rights, Green made an incriminating statement about the murder. Five months had passed between the time when Green was approached about the drug offense and he invoked his right to counsel, and the time when he was approached about the murder. He waived his rights and made a statement.[8]

The trial court suppressed the statement, finding that Green's invocation of the right to counsel had rendered him question-proof, meaning unapproachable for questioning. A question-proof suspect cannot be approached, for as long as he remains in custody, with regard to any crime, by any official who wishes to secure a *Miranda* waiver and question the suspect. The trial court in *Green* found that the defendant would remain question-proof for his entire period of incarceration.[9] If Green had experienced a break in custody (such as by being

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[6] 592 A.2d 985 (D.C. 1991), *cert. granted*, 504 U.S. 908 (1992), *vacated and cert. dismissed*, 507 U.S. 545 (1993).

[7] This Article uses the word "prison" to mean all jails, prisons, correctional facilities, and detention facilities, whether or not the facility holds pre-trial detainees or sentenced inmates.

[8] Green was arrested for the drug offense on July 18, 1989. On the police advice-of-rights form, he indicated that he was not willing to answer questions without an attorney. Counsel was appointed. Green was held for over three months, until September 27, 1989, when he pled guilty to a lesser included drug offense. He remained in a juvenile facility while a pre-sentence report was prepared. Finally, on February 26, 1990, he was sentenced to fifteen months in a juvenile facility. *See Green*, 592 A.2d at 985-86.

On January 4, 1990, several months after he had pled guilty to the drug offenses and several weeks before he was formally sentenced, a warrant was issued for Green's arrest for a murder committed a year earlier, months before his arrest on the drug charge. He was brought from the juvenile facility the next day to be booked on the murder charge. Before he was booked, he waived his *Miranda* rights and gave a videotaped confession to the murder. *See id.* at 986.

[9] The trial judge initially denied the motion to suppress, finding that, because Green met with counsel after his invocation of his right to counsel, he was not question-proof when he was questioned about the murder. *See id.* Just three days after the trial court's ruling, however, in *Minnick v. Mississippi*, the Supreme Court held that a defendant's question-proof status remains in place even after he has met with counsel as he requested. *Minnick*, 498 U.S. at 150. The trial judge reconsidered his ruling and suppressed the statement based on *Minnick*. *See Green*, 592 A.2d at 986.

released on bail before trial), his question-proof status would have ended and the officials would have been permitted to approach him about the murder.[10]

In the lower appellate court, the government did not make the argument, raised in this Article, that the defendant could be questioned, consistent with *Minnick*, because he was not continuously in custody for *Miranda* purposes despite his continuous incarceration in a correctional facility. The appellate court might, in fact, have been receptive to such an argument. Shortly after *Green* was decided, that court noted in another case that there is "substantial authority holding that an inmate is not 'in custody' for *Miranda* purposes merely because of his status as a prisoner." Smith v. United States, 586 A.2d 684, 685 (D.C. 1991). The *Smith* court found that it did not need to reach the custody issue because the unwarned questioning in that case was already justified as on-the-scene questioning rather than as interrogation for *Miranda* purposes. *See id.*

In the lower appellate court, the government in *Green* argued that the long period of five months between the invocation and the police reinitiation made it unreasonable to conclude that the defendant had been improperly badgered. The government conceded that the defendant had remained in custody for those five months, but pointed out that the period of time between invocation and police reinitiation had been just one to three days in the cases in which the Supreme Court had barred questioning after invocation of the right to counsel. The appellate court concluded, however, that this focus on the length of time between invocation and reinitiation obscured the bright-line nature of the rule in *Edwards v. Arizona*, 451 U.S. 477 (1981). *See Green*, 592 A.2d at 989.

The government also argued that Green's guilty plea was an event akin to either a break in custody or a defendant's own reinitiation and that the irrebuttable *Edwards-Minnick* presumption against a waiver of counsel should not apply where there is a significant change in status before interrogation. The appellate court concluded that the plea was not a pivotal break in events. *See id.* The dissenting judge, however, believed that the guilty plea "significantly changed" the circumstances from the time of the invocation and, thus, the irrebuttable presumption against the waiver of counsel should cease. *Id.* at 992 (Steadman, J., dissenting).

[10] The Supreme Court has not expressly ruled on the significance of a break in custody but its cases are all consistent with the view that a break in custody ends a defendant's question-proof status. *See, e.g.*, McNeil v. Wisconsin, 501 U.S. 171, 177 (1991) ("If the police do subsequently initiate an encounter in the absence of counsel (assuming there has been no break in custody), the suspect's statements are presumed involuntary . . . ."). While some commentators have criticized the rule that a suspect can be reapproached after a break in custody, *see, e.g.*, Elizabeth E. Levy, *Non-Continuous Custody and the* Miranda-Edwards *Rule: Break in Custody Severs Safeguards*, 20 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 539 (1994); Marcy Strauss, *Reinterrogation*, 22 HASTINGS CONST. L.Q. 359 (1995), courts have unanimously upheld the rule, *see* Levy, *supra*, at 541 nn.2–3 (citing collection of supporting cases); Strauss, *supra*, at 386 n.114 (citing collection of supporting cases); *see also* Dunkins v. Thigpen, 854 F.2d 394, 397 (11th Cir. 1988); McFadden v. Garraghty, 820 F.2d 654, 661 (4th Cir. 1987); United States v. Skinner, 667 F.2d 1306, 1309 (9th Cir. 1982); Kochutin v. State, 875 P.2d 778, 779 (Alaska Ct. App. 1994) ("The continuous custody requirement has been universally recognized by federal courts of appeal and appears to be a

But Green, like many suspects who are being held in prison on an unrelated matter, had been held continuously in prison facilities since the time when he invoked the right to counsel. The trial court deemed this continuous incarceration to be continuous *Miranda* custody. The court did not consider the possibility that Green, or any inmate, could be continuously incarcerated, yet could still experience a break in *Miranda* custody that would end the inmate's question-proof status and leave him available for questioning about a new crime under investigation.

In considering whether a continuously incarcerated suspect can be approached after he invokes his right to counsel, courts in *Green* and other cases[11] have assumed, with little or no discussion,[12] that the inmate was in

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well-established feature of the *Edwards* rule."); People v. Trujillo, 773 P.2d 1086, 1091–92 (Colo. 1989) (en banc); Commonwealth v. Galford, 597 N.E.2d 410, 414 (Mass. 1992) (collecting cases and finding "no authority to the contrary").

[11] In 1991, at the same time that *Green* was on appeal in the District of Columbia, appellate courts in Massachusetts and Alaska also considered cases in which an inmate was questioned after spending months in prison between the invocation of his right to counsel and the later questioning about a new, uncharged crime. Both the Massachusetts and Alaska courts, like the *Green* court, concluded that the inmate's statement was improperly obtained in violation of the proscription against approaching and questioning persons who had invoked their right to counsel and then remained in custody. *See* Kochutin v. State, 813 P.2d 298, 306 (Alaska Ct. App. 1991) (inmate questioned about a murder a year after invoking his right to counsel with regard to the unrelated matter for which he was serving a term of incarceration), *vacated*, 875 P.2d 778 (Alaska Ct. App. 1994); Commonwealth v. Perez, 581 N.E.2d 1010, 1018 (Mass. 1991).

[12] The Massachusetts court in *Perez*, like the *Green* court, expressed dismay with the outcome given the long period of time—six months—between the invocation and the later questioning. But the court assumed, without discussion, that continuous incarceration constituted continuous custody and left the defendant question-proof. *See Perez*, 581 N.E.2d at 1015. The Alaska court in *Kochutin*, faced with a particularly long gap of a year between invocation and interrogation, did consider the custody issue but held that the continuously incarcerated inmate had been in continuous custody for *Miranda* purposes. *See Kochutin*, 813 P.2d at 304.

The Alaska Court of Appeals's confusion about the issue of when incarcerated suspects may be questioned was evident in a case decided shortly after *Kochutin*. In *Carr v. State*, 840 P.2d 1000 (Alaska Ct. App. 1992), the court considered the unwarned questioning of an inmate who had never invoked his right to counsel. *Id.* at 1003. The court concluded that, even though the inmate was incarcerated when he gave his statement, he was not in custody for *Miranda* purposes so no *Miranda* warnings were required. *Id.* at 1005. In concluding that the inmate was not in *Miranda* custody, the *Carr* court cited the *Kochutin* dissent. *Id.* at 1004. Having excused the absence of any warnings by finding that a person could be incarcerated but not in *Miranda* custody, the court made the seemingly inconsistent observation that if the defendant's complaint had concerned a prior invocation of the right to counsel, then under the

continuous custody for *Miranda* purposes. Finding no breaks in custody during incarceration, these courts have concluded that an inmate's question-proof status remains intact throughout the entire period of incarceration and ends only when the inmate leaves all correctional facilities. Under this view of the relationship between incarceration and *Miranda* custody, an inmate cannot be questioned even when, as in *Green*: months or years have passed since the suspect invoked the right to counsel; the original offense has been long resolved; the inmate has settled into the routine of prison life; the inmate is now a suspect in a serious crime; and the inmate is given his *Miranda* warnings after he is approached and before any questioning about the new crime under investigation begins.

The situation presented in *Green*, that of the long question-proof suspect, is likely to become even more common given current trends in law enforcement. New York and other large cities have enacted specific policies requiring officers to arrest people for minor, quality of life crimes partly in the hope that the arrestee will turn out to be a suspect in some much more serious, unsolved crime. The efficacy of this much applauded policy[13] will be greatly diminished if arrestees invoke the right to counsel when approached about the initial minor crime, fail to make bail, and are then deemed question-proof before the police even have a chance to learn what serious crime the arrestee is suspected of committing.[14]

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majority opinion in *Kochutin*, the continuous incarceration would be viewed as continuous custody for *Miranda* purposes. The court made no attempt to reconcile its conflicting findings in *Carr* and *Kochutin* as to whether continuous incarceration always constitutes continuous custody for *Miranda* purposes.

[13] *See, e.g.*, Linda Chavez, *N.Y. Lives, But D.C. Drops Dead*, CINCINNATI ENQUIRER, Apr. 7, 1996, at F2; *Communities Show How to Fight Crime*, TAMPA TRIB., Dec. 8, 1996, at 2; Rosie DiManno, *Bite the Big Apple—And Find Lessons in Crime Fighting*, TORONTO STAR, Aug. 16, 1996, at A7; Chris Sheridan, *Taming the Big Apple, Bite by Bite*, PLAIN DEALER (Cleveland, Ohio), Dec. 15, 1996, at 2E.

[14] While there is no way to know precisely how often law enforcement officers are faced with incarcerated suspects who, like Green, had earlier invoked the right to counsel, the somewhat limited number of reported appellate decisions is hardly surprising. In my own experience as a prosecutor, I found law enforcement officers confused about *Miranda*'s application to inmates and hesitant to interview incarcerated suspects without counsel present. Moreover, even if the percentage of suspects who invoke the right to counsel, remain in a prison facility, and become a suspect in a new crime is relatively small, the large number of convictions nation wide each year means that there are a significant number of situations like the one faced by the police in *Green*. *See* Paul G. Cassell, Miranda*'s Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 496 (1996) (stating that if 20% of suspects invoke their *Miranda* rights, then 550,000 criminal suspects are rendered question-proof each year).

The potentially indefinite bar on questioning after an invocation of the Fifth Amendment right to counsel is particularly indefensible in light of the fact that, under the applicable totality of the circumstances test, the bar on questioning after an invocation of the Fifth Amendment right to silence can be lifted in a matter of a few hours.[15] Given that *Miranda* created both the right to silence and the right to counsel in order to protect the same constitutional right against self-incrimination, the enormous difference in the duration of the question-proof status from invocation of the two rights cannot be justified.

Presumably, the Court granted certiorari in *Green* because of the seemingly absurd result created by a highly technical interpretation of *Miranda*'s bright-line rules.[16] When *Green* was argued before the Court, a number of the Justices indicated great concern with the potentially lengthy duration of an inmate's question-proof status after he invokes the right to counsel.[17] Justice O'Connor

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[15] *See* Michigan v. Mosley, 423 U.S. 96, 107 (1975) (permitting a resumption of questioning just two hours after an invocation of the right to silence).

[16] As one commentator suggested, the Court granted certiorari in *Green* because of the "absurd" result created by the potentially unlimited duration of the prophylactic rule of *Edwards v. Arizona*, 451 U.S. 477 (1981). *See* George E. Dix, *Promises, Confessions, and Wayne LaFave's Bright Line Rule Analysis*, 1993 U. ILL. L. REV. 207, 231. Even Professor Yale Kamisar, one of *Miranda*'s staunchest supporters, has stated that although he "never thought [he] would say this about a *Miranda* case in the post-Warren Court era," he thinks "*Minnick* may go *too far* in favor of the defense." Yale Kamisar, *The Warren Court and Criminal Justice: A Quarter-Century Retrospective*, 31 TULSA L.J. 1, 19 (1995) (referring to *Minnick v. Mississippi*, 498 U.S. 146 (1990)).

[17] At the November 30, 1992 oral argument, Justice White asked the government whether it would matter if the defendant had been questioned just a day after his invocation. Justice O'Connor also asked questions about the timing of questioning and tried to determine whether it mattered if the questioning occurred after "three months," "two months," "one month," or "two days." *Arguments Heard*, 52 Crim. L. Rep. (BNA) 3096, 3097 (Nov. 30, 1992). She also asked about the questioning of a defendant serving a life sentence. *See id.* Finally, she asked whether sentencing should be an event that ends the question-proof status by ending the *Edwards* presumption of non-waivability of the right to counsel. *See id.* at 3097–98. The government virtually conceded that Green had been in continuous custody and the Court did not expressly question the litigants about whether continuous incarceration is per se continuous custody for *Miranda* purposes. *See id.* at 3096–98.

Chief Justice Rehnquist indicated a general concern with all of *Miranda*'s prophylactic rules by questioning the government's attorney as to why the government was, once again, declining to rely on 18 U.S.C. § 3501 (1994). *See Arguments Heard*, *supra*, at 3096. That statute, enacted shortly after the *Miranda* decision, provides that any confession voluntarily given is admissible. 18 U.S.C. § 3501(a) (1994). In questioning the government's attorney in *Green*, Justice Scalia accused the government of "'executive nullification' of the legislation." *Arguments Heard*, *supra*, at 3097–98. In *Minnick v. Mississippi*, Justice Scalia vigorously dissented from the extension of the prophylactic *Edwards* rule that had created the problem

asked whether the bar on questioning after invocation of the right to counsel "has a time limit in the case of a defendant sentenced to life imprisonment, or is the defendant off-limits forever?"[18] Defense counsel insisted that there is "no time limit"[19] and that the bar could last forever. Despite speculation that an opinion in *Green* was to be issued imminently,[20] the Court left this troubling issue unresolved by dismissing the case[21] when Lowell Green was murdered shortly after the argument.[22]

The Court is likely to consider the issue again given the significant implications for law enforcement from the conclusion of lower courts that continuously incarcerated inmates, like Lowell Green, remain forever question-proof after invoking the right to counsel.[23] If a continuously incarcerated inmate is viewed as never having a break in custody for *Miranda* purposes, then an inmate who invokes his right to counsel will remain question-proof for the entire duration of his incarceration. Under such an expansive view of custody, a one time request for counsel could leave an inmate question-proof about any matter for his entire life. Such potential suspects are rendered immune from

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presented in *Green*, and addressed in this Article, of a potentially endless *Edwards* bar on questioning. *See* Minnick v. Mississippi, 498 U.S. 146, 165 (1990) (Scalia, J., dissenting); *see also* Davis v. United States, 512 U.S. 452, 462 (1994) (Scalia, J., concurring) (raising the § 3501 issue).

[18] *Arguments Heard*, *supra* note 17, at 3097.

[19] *Id.* at 3097. Defense counsel did suggest that the *Edwards* bar could be limited by applying it indefinitely only "to crimes committed prior to the invocation of his *Miranda* rights" and not to crimes committed in prison. *Id.* This concession, however, would require the Court to overrule its express holding in *Arizona v. Roberson*, 486 U.S. 675, 682 (1988), that the *Edwards* bar is not offense specific and is applied to all crimes.

[20] *See* Linda Greenhouse, *Supreme Court Roundup: No Review of Espionage Conviction*, N.Y. TIMES, Apr. 6, 1993, at A18.

[21] *See* United States v. Green, 507 U.S. 545, 545 (1993) (vacating order granting certiorari as moot).

[22] Mr. Green was murdered about four months after the argument, on March 24, 1993. *See id.*

[23] The discomfort many members of the Court have with the broad protections *Miranda* offers after invocation of the right to counsel was evident in *Minnick v. Mississippi*, 498 U.S. 146 (1990). There, the Court held that the bar on questioning remained in place even though the defendant had been allowed to meet with counsel as requested. *Id.* at 150. *Minnick* was a 5-4 decision with an extremely strong dissent by Justice Scalia. *Id.* at 156 (Scalia, J., dissenting). *Green*'s further expansion of the protections offered by *Miranda* and *Minnick* is especially inappropriate given the shaky support *Minnick* itself enjoys. Lower courts have expressed their discomfort with a potentially indefinite *Minnick* bar to questioning after invocation of the right to counsel and have urged the Court to consider the troublesome issue. *See, e.g.*, Walker v. State, 573 So. 2d 415, 416 (Fla. Dist. Ct. App. 1991), *cert. granted, judgment vacated*, 504 U.S. 903 (1992).

questioning no matter how carefully officers might warn them of their rights. Investigations of unsolved crimes are greatly impeded when officials cannot even approach a suspect who happened to have invoked the right to counsel with regard to a matter long disposed of and for which the suspect is now serving a lengthy sentence.[24]

Miranda and its progeny do not support, much less compel, the finding that an inmate who once invoked the right to counsel and remains continuously incarcerated also remains forever question-proof. The balance sought in *Miranda* between individual rights and the needs of law enforcement[25] is not met by conferring a question-proof status on some inmates that can last as long as their natural life. Examination of the Court's existing *Miranda* jurisprudence reveals that lower courts have taken an unnecessarily narrow view of the authority of law enforcement officials to approach and question incarcerated suspects who earlier invoked the right to counsel.[26]

Moreover, the cases that have equated continuous incarceration with continuous custody in order to bar the questioning of those inmates who happened to have invoked the right to counsel are squarely in conflict with a large and growing body of law decided in another context. This other body of cases concludes clearly and persuasively that inmates are not in custody for *Miranda* purposes during every moment of their incarceration.[27] These numerous cases have arisen in the situation where an inmate who had never

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[24] There are substantial administrative problems in maintaining readily accessible records for long periods of time to document which inmates have invoked the right to counsel and then remained in continuous custody. Obviously, it can be done. Consider, however, the predicament of a law enforcement official who wishes to approach an incarcerated suspect. Presumably, the official should first determine whether, and for how long, the suspect has been in any facility. The official needs to create a chronology of every detention facility, in both federal and state jurisdictions, in which the suspect was placed. The official must then investigate when the suspect was ever interrogated about any matter and whether he ever invoked the right to counsel. There is no system in place now for keeping track of invocations or for making such information generally available to all law enforcement officials. The creation of such a system, to track invocations and disseminate the information from a central file, would be enormously difficult.

[25] All of criminal procedure, and most particularly issues surrounding the admissibility of statements, involves the balancing of competing values. Most simplistically, the interest of society in law enforcement contained in the Crime Control model of criminal process must be balanced with society's equally important interest in the protection of individual rights, as contained in the Due Process model of criminal process. *See* Herbert L. Packer, *The Courts, the Police and the Rest of Us*, 57 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 238, 239 (1966).

[26] *See supra* notes 6–12 and accompanying text.

[27] *See, e.g.*, Cervantes v. Walker, 589 F.2d 424, 427 (9th Cir. 1978); *see also infra* Part V.B.–C.1.

invoked his right to counsel, and thus could be properly approached for questioning, was questioned in prison without having been given the *Miranda* warnings. Many courts have admitted the resulting, unwarned statements by concluding that at the moment of questioning the inmate was not in custody for *Miranda* purposes and, thus, was not entitled to the *Miranda* warnings. Courts have reached this conclusion, that a questioned inmate was not in *Miranda* custody, by applying an "additional restraint" test to determine custody.[28]

The traditional "free to leave"[29] test, used to determine custody in settings such as the police station house, is not particularly useful in a prison setting where none of the inmates are free to leave the facility. The cases relying on the additional restraint test to define custody stand for the important principle that a person can be incarcerated yet not be in custody for *Miranda* purposes.[30] Thus, these cases provide ample support for the premise of this Article—that a continuously incarcerated inmate can experience a break in custody that will end the question-proof status he obtained upon his earlier invocation of the right to counsel. That break in custody will leave the inmate approachable for questioning about new crimes under investigation.

In fact, a sentenced inmate experiences not just some brief "break in custody" but is generally not in *Miranda* custody for most of the term of incarceration. An inmate who has been sentenced and has settled into the routine of prison life is not in *Miranda* custody, and will return to custody for *Miranda* purposes only when he is subjected to some additional restraint beyond those of his normal life as an inmate. Imposition of an additional restraint will return him to a custodial state and entitle him to be given the *Miranda* warnings before any interrogation.[31] However, the question-proof status that bars officials from approaching a suspect for questioning will have ended, because the inmate will have experienced a long period of non-custodial incarceration before any additional restraint was imposed on him.[32]

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[28] *See, e.g.*, State v. Deases, 518 N.W.2d 784, 789 (Iowa 1994); *see also infra* notes 196–205 and accompanying text.

[29] *See infra* notes 185–89 and accompanying text.

[30] *See infra* notes 196–205.

[31] *See infra* note 183.

[32] In its amicus brief to the Court in *Green*, the Public Defender's Service acknowledged that Green had been held for months in the "familiar quarters" of the Youth Center where he could refuse to see visitors but that, when he gave his statement about the murder, he had been moved to the Homicide Branch of the police station. Brief for the Public Defender Service for the District of Columbia and the National Legal Aid and Defender Association as Amici Curiae Supporting Affirmance at 31–32, United States v. Green, 504 U.S. 908 (1992). *vacated and cert. dismissed*, 507 U.S. 545 (1993) (No. 91-1521). This physical move should be viewed as an additional restraint that returned Green to a custodial state and entitled him to *Miranda* warnings.

Lower courts have defined *Miranda* custody narrowly in order to uphold the unwarned questioning of the vast majority of inmates who never invoked the right to counsel. But in other cases, these same courts then define custody broadly to prohibit even warned questioning of the much smaller group of inmates who happened to have invoked the right to counsel in the past. Good sense should make courts reach precisely the opposite result.[33] Courts should not allow a one time request for counsel to immunize a few inmates from any questioning at all while leaving most inmates to be questioned without even being warned. Instead, courts should allow nearly all inmates, whether or not they made a long ago request for counsel, to be approached for questioning, but courts should also encourage the provision of warnings before most inmates are questioned.

In Part II, this Article explains how a suspect can render himself question-proof. Because *Miranda*'s rules can be understood properly only after considering both the costs and the benefits of the rules, Part III undertakes a review of the Fifth Amendment values underlying *Miranda*, the benefits from the bright-line quality of *Miranda*'s rules, and the costs imposed by the prophylactic nature of the rules. Two possible but ultimately problematic approaches for considering the issue of how long an inmate's question-proof status lasts are outlined in Part IV. Finally, Part V presents a better solution: courts should recognize that an inmate is not in custody for *Miranda* purposes for most of his term of incarceration as a sentenced prisoner. Although continuously incarcerated, an inmate will experience the break in custody that ends any question-proof status that arose from an earlier invocation of the

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[33] At least one lower court has endorsed the analysis urged in this Article and concluded that an inmate could be questioned because his question-proof status after invocation of his Fifth Amendment right to counsel had ended even though he never left incarceration. In *United States v. Hall*, 905 F.2d 959, 963 (6th Cir. 1990), the defendant was in a state prison serving a state sentence when he became a suspect in a threat on the life of the President and the Vice President. *Id.* at 959. He was interrogated about the threat three months after allegedly invoking his right to counsel when arraigned on an escape charge unrelated to the federal charge. *Id.* at 960. The court found no bar to the questioning about the threat despite the earlier invocation because:

> Hall remained in jail, but he was there because he was already serving a prior sentence. Hall was no stranger to the state penitentiary. In fact, Hall was not "in custody" as that term has been used in the context of *Edwards* and *Roberson*. One could readily argue that Hall was more comfortable within the surroundings in which he was interrogated than the two Secret Service Agents.

Id. at 962. The court concluded that *Edwards* cannot "be interpreted within this appeal to grant to Hall such a blanket protection continuing *ad infinitum*." *Id.* at 963.

Miranda right to counsel. With the question-proof status gone, the inmate can be approached, given fresh *Miranda* warnings, and questioned if he wishes to waive his rights.

This Article concludes that defining custody in prison by use of the additional restraint test, which takes account of the unique circumstances of a prison setting, appropriately balances individual rights and law enforcement interests. Currently, courts have not applied the additional restraint test when considering the custodial status of those inmates who long ago invoked the right to counsel. These inmates have been granted so much protection that they cannot even be approached for questioning about a new crime. Yet, many courts do apply the additional restraint test with regard to all other inmates, so that the vast majority of inmates receive very little protection from interrogation while in prison. Under the cramped view of the additional restraint test imposed by many courts, not only can most inmates be approached, they can also be questioned without any *Miranda* warnings because they are considered incarcerated but not in custody at the moment they are being questioned. A sounder result would be reached by (1) applying the additional restraint test to determine the custodial status of all inmates, whether or not they ever invoked the right to counsel, and (2) interpreting that test to find additional restraints more liberally than do many courts. The result would be that officials could approach nearly all inmates about new crimes but that officials would have to provide most inmates with their *Miranda* rights and obtain waivers before questioning them.

II. RIGHTS CREATING A QUESTION-PROOF STATUS

A person who is question-proof cannot be approached for questioning without counsel. It does not matter how careful or protective the authorities are in explaining the person's rights before beginning any actual questioning or how comprehensive the waiver of rights colloquy is; the approach itself is prohibited. If officials wish to speak with a question-proof suspect, they have two options. First, they can wait for the suspect to approach them and initiate contact about the crime being investigated.[34] Of course, even if a suspect should somehow discover that he is being investigated, he would have little incentive to approach officials on his own. Second, officials can wait for the question-proof status to end. Whether and when the question-proof status will end depends on which constitutional right the suspect invoked to trigger his question-proof status. If the question-proof status does end, the suspect may be

[34] *See* Oregon v. Bradshaw, 462 U.S. 1039, 1045 (1983) (plurality opinion) (after invoking his right to counsel, defendant reinitiated contact by asking the police, "Well, what is going to happen to me now?").

approached, given the *Miranda* warnings, and questioned just like any suspect.[35]

A suspect may become question-proof based on the rules designed to protect two different constitutional rights: the Sixth Amendment right to counsel[36] and the Fifth Amendment right not to incriminate oneself.[37] The Fifth Amendment right not to incriminate oneself is protected under *Miranda*'s prophylactic rules by two separate rights: a Fifth Amendment right to remain silent and a Fifth Amendment right to counsel.[38] Thus, there are three separate constitutional rights that a person can invoke to render himself question-proof: the Sixth Amendment right to counsel, the Fifth Amendment right to silence, and the Fifth Amendment right to counsel.

These three rights place different limits on the police by rendering suspects question-proof beginning at different times, for different lengths of time, and with regard to different subject matters. This section briefly reviews the effect of invoking each of the three rights, but the Article focuses on the Fifth Amendment right to counsel because it is the right placing the most substantial limits on law enforcement officials. The other two rights do not generally have the long term effect of precluding questioning about unsolved crimes.

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[35] Technically, of course, there is a third option. The police could attempt to question the suspect in the presence of counsel. In most instances, the police will view this option as useless. As Justice Harlan acknowledged in *Miranda*, "if counsel arrives, there is rarely going to be a police station confession [because] '[a]ny lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances.'" Miranda v. Arizona, 384 U.S. 436, 516 n.12 (1966) (Harlan, J., dissenting) (quoting Watts v. Indiana, 338 U.S. 49, 59 (1949)).

[36] The Sixth Amendment states: "In all criminal prosecutions, the accused shall enjoy . . . the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

[37] The Fifth Amendment actually provides a right not to be "compelled" to incriminate oneself. U.S. CONST. amend. V. As Professor Grano has noted, the "shorthand expression—the right against self-incrimination—is popular but inaccurate . . . . This expression too easily allows discussion to focus on protecting the defendant's 'right to remain silent.'" Joseph D. Grano, Rhode Island v. Innis: *A Need to Reconsider the Constitutional Premises Underlying the Law of Confessors*, 17 AM. CRIM. L. REV. 1, 5 n.26 (1979).

[38] The Fifth Amendment does not contain any express reference to or grant of a right to counsel. The Fifth Amendment right to counsel is an indirect right to counsel derived from the Self-Incrimination Clause of the Fifth Amendment, which guarantees that no person "shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. This Fifth Amendment right to counsel is one of the two separate rights to counsel grounded in the Constitution. It is the Sixth Amendment that expressly provides for a "right . . . to Counsel." U.S. CONST. amend. VI. The Fifth and Sixth Amendment rights to counsel provide somewhat different rights for individuals and place different limits on government officials.

A. *The Sixth Amendment Right to Counsel*

The Sixth Amendment right to counsel renders a suspect question-proof only after the right has both attached[39] and been invoked.[40] Whether or not a defendant is in custody, the right attaches once formal proceedings are initiated, as by indictment or formal arraignment.[41] Once the Sixth Amendment right to counsel has attached, a defendant may invoke the right by retaining counsel, requesting counsel, or accepting the appointment of counsel.[42] Once the right has both attached and been invoked, a defendant is question-proof forever, by any official,[43] even if he leaves custody.[44] He may not be questioned in the absence of counsel by any state actor—including undercover agents and informants—about his charged crimes.[45] Even if he is released to his home on bail after arrest, he is question-proof if he has obtained counsel to represent him for his charged crimes.

However, the Sixth Amendment right to counsel is offense specific; it applies only to the charged crimes.[46] The defendant can still be questioned,

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[39] *See* Kirby v. Illinois, 406 U.S. 682, 690 (1972).

[40] *See* Patterson v. Illinois, 487 U.S. 285, 290–91 (1988). While invocation, as well as attachment, is required to render a defendant unapproachable by officials seeking a waiver of his rights, attachment alone suffices to protect a defendant from undercover questioning. *See* Massiah v. United States, 377 U.S. 201, 206 (1964).

[41] The right does not attach before formal proceedings are initiated, even if the defendant is a suspect and even if he has already retained an attorney. *See Kirby*, 406 U.S. at 688.

[42] Courts have not entirely resolved exactly what a suspect must do to invoke the Sixth Amendment right to counsel. Although passive acceptance of the appointment of counsel may constitute invocation, at least one court has required more affirmative action on the part of the suspect. *See* Montoya v. Collins, 955 F.2d 279, 282 (5th Cir. 1992) (noting that the defendant was present at arraignment but said nothing when counsel was appointed; no invocation found). Similarly, appearance at an extradition hearing with an attorney does not constitute invocation of the right to counsel. *See* Chewning v. Rogerson, 29 F.3d 418, 422 (8th Cir. 1994) (stating that there is no invocation by appearance at an extradition hearing with an attorney appointed only for the hearing); Wilcher v. Hargett, 978 F.2d 872, 876 (5th Cir. 1992) (stating that there is no invocation when the court appointed counsel for defendant out of defendant's presence). It is not clear whether a defendant is deemed to have invoked the right if he had already hired counsel when he was arrested.

[43] Knowledge of the defendant's invocation of his right to counsel may be imputed to all state actors. *See* Michigan v. Jackson, 475 U.S. 625, 634 (1986).

[44] *See id.*

[45] *See* Illinois v. Perkins, 496 U.S. 292, 299–300 (1990); Maine v. Moulton, 474 U.S. 159, 180 (1985); *Massiah*, 377 U.S. at 207.

[46] There are two possible exceptions to the rule that the Sixth Amendment allows questioning about any uncharged crimes. First, federal and state authorities cannot act together to arrange their charging decisions to deprive a defendant of his Sixth Amendment

either directly[47] or through undercover agents or informants,[48] about any uncharged crimes under investigation.[49] Because the Sixth Amendment right to counsel applies only to charged crimes, it does not create a great obstacle for officials investigating crimes. Even after the right attaches and is invoked, the authorities can still question a suspect about any uncharged crimes under investigation without violating the Sixth Amendment.[50]

B. *The Fifth Amendment Right to Silence*

The Fifth Amendment right to silence is derived directly from the Self-Incrimination Clause of the Fifth Amendment, which guarantees that "[n]o person . . . shall be compelled in any criminal case to be a witness against

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right. *See* Hendricks v. Vasquez, 974 F.2d 1099, 1104 (9th Cir. 1992); United States v. Martinez, 972 F.2d 1100, 1103–05 (9th Cir. 1992) (state had dismissed charges but defendant argued that federal prosecution for same offense created a "seamless web of both incarceration and prosecution"). Second, and more commonly at issue, the Sixth Amendment bar on questioning may be applied to uncharged crimes if they are related or inextricably intertwined with the charged crimes. *See, e.g.*, *In re* Pack, 616 A.2d 1006, 1010–11 (Pa. Super. Ct. 1992) (noting a Sixth Amendment violation exists where defendant had counsel for the initially charged crime of receiving stolen property and was questioned later on the related charge of burglary arising from the same incident); *see also* People v. Clankie, 530 N.E.2d 448, 451 (Ill. 1988) (involving different thefts at the same house); People v. Hoskins, 523 N.E.2d 80, 84 (Ill. App. Ct. 1988) (involving two intertwined crimes: aggravated assault and murder). However, there is no Sixth Amendment bar if related crimes have totally independent elements and arose from separate incidents involving separate conduct. *See, e.g.*, Hendricks v. Vasquez, 974 F.2d at 1104–05 (stating that defendant who had been arraigned on the charge of interstate flight to avoid prosecution for murder could still be interrogated about the murder); *see also* United States v. Kidd, 12 F.3d 30, 33 (4th Cir. 1993) (stating that defendant was arrested for selling crack cocaine and was released on bail after the appointment of counsel; the court held admissible a taped statement the police obtained several weeks later in the course of making an undercover purchase of crack cocaine from the defendant).

[47] *See* McNeil v. Wisconsin, 501 U.S. 171, 176 (1991).

[48] *See Perkins*, 496 U.S. at 299.

[49] As with the Fifth Amendment rights, if a statement was voluntary but was obtained in violation of the prophylactic rule protecting the Sixth Amendment right to counsel (waiver is invalid where police reinitiate questioning after invocation) it can still be used to impeach the defendant. *See* Michigan v. Harvey, 494 U.S. 344, 352 (1990).

[50] The need to question suspects about charged crimes is not nearly as great as the need to question them about uncharged crimes. If authorities have already charged a person with a crime, presumably they did so in the belief that they had enough evidence to try him for that charged crime. Authorities can hardly claim it is essential that they be able to question the person about the charged crime without his attorney present. *See* Grano, *supra* note 37, at 15.

himself."[51] A defendant can invoke his Fifth Amendment right to silence only if he is both in custody and is being interrogated or is about to be interrogated.[52] A defendant faced with custodial interrogation can invoke his Fifth Amendment right to silence either by expressly refusing to answer questions or by simply remaining silent in the face of questions, even routine booking questions.[53]

Once a defendant has invoked his Fifth Amendment right to counsel, there are significant limits placed on law enforcement officials. The defendant cannot be questioned or approached for questioning by any law enforcement actor from any jurisdiction.[54] He cannot be questioned indirectly through the use of agents or informants.[55] Most significantly, he cannot be questioned about any

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[51] U.S. CONST. amend. V; *see* Malloy v. Hogan, 378 U.S. 1, 8 (1964) (applying the Fifth Amendment to the states); *see also* David Dolinko, *Is There a Rationale for the Privilege Against Self-Incrimination?*, 33 UCLA L. REV. 1063, 1147 (1986) (arguing that there is no systemic or individual rationale for the privilege, and that it does not embody fundamental, enduring principles, but that it may nevertheless be defensible based on its long history).

[52] *See McNeil*, 501 U.S. at 182 n.3 ("We have in fact never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than 'custodial interrogation' . . . ."); Miranda v. Arizona, 384 U.S. 436, 478 (1966) ("[W]e hold that when an individual is taken into custody . . . and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed . . . .").

[53] *See* United States v. Montana, 958 F.2d 516, 518 (2d Cir. 1992). But a suspect does not invoke his Fifth Amendment right to silence by requesting to see a person other than an attorney, such as a probation officer, or by telling the officers that he will give an oral statement immediately but will give a written statement only once his attorney arrives. *See* Connecticut v. Barrett, 479 U.S. 523, 529-30 (1987). Moreover, a suspect himself must invoke his Fifth Amendment right to silence. This right cannot be invoked for him by his attorney, a family member, or some other person. *See* Moran v. Burbine, 475 U.S. 412, 419 (1986).

[54] *See* Minnick v. Mississippi, 498 U.S. 146, 153-54 (1990) (after defendant was questioned by FBI agents and he invoked his rights, he could not be questioned by a state officer). While knowledge is certainly imputed to everyone in the same office and probably imputed to any official in the same jurisdiction, it is not absolutely certain that it would be imputed to every official in another jurisdiction.

[55] *See* Illinois v. Perkins, 496 U.S. 292, 300 (1990). The bar on indirect questions by informants or undercover agents is based on dictum in *Perkins*. That case concerned only undercover questioning of an incarcerated defendant who had never invoked his Fifth Amendment right to silence. The Court's holding that no warning is required because the inmate does not know he is being questioned by a government official would seem to apply to allow undercover questioning even if the inmate had earlier invoked the right to silence or counsel. Yet, in a footnote, the Court strongly suggested that the holding would be different and undercover questioning of the inmate would not be allowed if the inmate had earlier

crime, charged or uncharged.

But, while officials must scrupulously honor[56] the request for silence, a suspect's question-proof status based on an invocation of the right to silence does not last forever. It may end for three reasons. First, it ends if the suspect reinitiates contact with the officials about his crimes.[57] Second, it ends if there has been a break in custody.[58] Of course, officials cannot manufacture a brief, pretextual break in custody, as by releasing and then quickly detaining the defendant.[59] But, if the defendant is released on bail for his charged crimes, that break in custody will end his question-proof status and he can be approached for questioning about any uncharged crimes.

Third, the question-proof status may end merely with the passage of time.[60] Officials need not wait for a suspect to approach them or for him to be released from custody before they can approach him for questioning. In fact, the question-proof status from an invocation of the right to remain silent may well lapse before the defendant has even completed the post-arrest processing,

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invoked his right to silence or counsel. *Id.* at 300 n.*.

It is not clear why there should be a bar on undercover questioning after invocation of either the Fifth Amendment right to counsel or silence. The *Miranda* rights protect a suspect from the potentially coercive environment created when suspects find themselves faced with the power of the state in the form of a police officer. A suspect has no such feelings when confronted with an undercover agent or informant. In fact, the United States Court of Appeals for the Second Circuit found *Perkins* inapplicable and allowed undercover questioning without *Miranda* warnings even when the defendant had invoked his Fifth Amendment right to counsel. *See* Alexander v. Connecticut, 917 F.2d 747, 751 (2d Cir. 1990). While *Alexander* makes sense, it fails to address the *Perkins* footnote suggesting a contrary result.

[56] *See* Michigan v. Mosley, 423 U.S. 96, 103–04 (1975).

[57] *See* Oregon v. Bradshaw, 462 U.S. 1039, 1045 (1983) (plurality opinion).

[58] *See supra* note 10. In teaching criminal procedure, I have found it helpful to my students to refer to an invocation of the right to counsel as creating a protective "bubble" around the defendant. The question-proof defendant in the bubble cannot even be approached for questioning. As soon as the suspect leaves custody, however, the bubble bursts. By contrast, the protective bubble created by invocation of the Sixth Amendment right to counsel does not burst, but stays with the defendant wherever he goes. Of course, the Sixth Amendment bubble is in one respect more protective (because it protects the defendant from undercover questioning) and in one respect less protective (because it protects the defendant from being approached only about questioning on charged crimes) than the right to silence.

[59] *See* Dunkins v. Thigpen, 854 F.2d 394, 397 n.6 (11th Cir. 1988) ("There is no contention that the break in custody was contrived or pretextual. We do not imply that our holding would be the same in the event of a contrived or pretextual break in custody."); United States v. Vaughters, 44 M.J. 377 (C.A.A.F.), *cert. denied*, 117 S. Ct. 587 (1996); United States v. Grooters, 39 M.J. 269, 275 (C.M.A. 1994) ("[T]he Government is not relieved of its duties under *Edwards* if there is a contrived pretextual break in custody.").

[60] *See Mosley*, 423 U.S. at 102–06.

posted bail, and been released from police custody. The defendant can be reapproached for questioning even if he has not yet met with an attorney.[61]

There is no bright-line test for determining precisely when the question-proof status from an invocation of the right to silence ends. Instead, courts undertake a multi-factor consideration of the totality of the circumstances, including whether fresh *Miranda* warnings were given, whether a new subject matter such as an unrelated crime was discussed, and whether the questioning was at a different place and by a different officer.[62] Nevertheless, the critical factor is the mere passage of time.

In some circumstances, as little as two hours may separate the invocation of the right and the questioning by the authorities on an uncharged, unrelated matter. To question a suspect about the same criminal matter, an official must generally wait several more hours. Because of the relatively short period that a defendant usually remains question-proof from an invocation of the right to silence, such invocations should not have a substantially adverse effect on the investigation of new crimes.[63]

C. *The Fifth Amendment Right to Counsel*

The Fifth Amendment right to counsel is an indirect right to counsel derived from the Fifth Amendment right not to incriminate oneself. As with the Fifth Amendment right to remain silent, the Fifth Amendment right to counsel is triggered only by the simultaneous combination of custody and interrogation.[64] To invoke the right, a suspect need tell only one person that he

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[61] *See id.* at 106–07.

[62] *See id.* at 104 (characterizing an interval of just more than two hours as "the passage of a significant period of time"); Commonwealth v. Henry, 599 A.2d 1321, 1321–22 (Pa. Super. Ct. 1991) (suppressing a statement obtained immediately after the invocation of the right to silence; however, questioning on the same crime was permitted after 15 hours); Commonwealth v. Migogna, 585 A.2d 1, 5–6 (Pa. Super. Ct. 1990) (noting that the accused was properly questioned about the same crime less than three hours after invoking his right to silence).

[63] Of course, whenever officials speak with a suspect after an invocation of the right to silence, whether because the suspect reinitiated contact or because the officials did so after the passage of time or a break in custody, any statement obtained after the question-proof status lapses must still meet all the requirements for voluntariness. The statement must be given after a voluntary, knowing, and intelligent waiver of rights. *See* Oregon v. Bradshaw, 462 U.S. 1039, 1044–45 (1983); Wyrick v. Fields, 459 U.S. 42, 46–48 (1982); Edwards v. Arizona, 451 U.S. 477, 486 n.9 (1981); Dunkins v. Thigpen, 854 F.2d at 397 ("Even if a defendant has initiated contact with the police after requesting counsel, any statements made are still inadmissible unless they are the product of a knowing and voluntary waiver.").

[64] Thus, a defendant cannot invoke the right before he has been taken into custody. He

wants counsel. Knowledge of the invocation will then be imputed to all state actors.[65] But the defendant must unambiguously invoke his Fifth Amendment right to counsel.[66] Officers may ignore any ambiguous comments and continue interrogation.[67]

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cannot, for example, claim that he invoked his Fifth Amendment right to counsel when he made a general statement before the grand jury that he wanted to be questioned only with counsel. *See* United States v. Barnett, 814 F. Supp. 1449, 1453–54 (D. Alaska 1992). Moreover, a defendant who is in custody cannot invoke his Fifth Amendment right to counsel far in advance of interrogation. *See* McNeil v. Wisconsin, 501 U.S. 171, 182 n.3 (1991) ("We have in fact never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than 'custodial interrogation' . . . ."); Alston v. Redman, 34 F.3d 1237, 1246 (3d Cir. 1994) (a request for counsel can be made "no sooner" than the context of custodial interrogation); United States v. Wright, 962 F.2d 953, 955 (9th Cir. 1992) (*Miranda* protection was not triggered by counsel's request to be present at all interviews with defendant); United States v. Grimes, 911 F. Supp. 1485, 1496 (M.D. Fla. 1996) (*Miranda* rights not invoked by letter claiming such rights weeks before defendant was questioned); Commonwealth v. Davis, 565 A.2d 458, 462 (Pa. Super. Ct. 1989) (defendant cannot invoke his Fifth Amendment right to counsel at his preliminary arraignment).

[65] *See* Arizona v. Roberson, 486 U.S. 675, 687 (1988).

[66] *See* Davis v. United States, 512 U.S. 452, 459 (1994).

[67] A defendant is not invoking his right to counsel if he "merely seeks a clarification of what his or her rights are." United States v. March, 999 F.2d 456, 461 (10th Cir. 1993). In determining whether a request is unambiguous, officers can consider only the events preceding the request and the request itself. They cannot use any post-request responses to further interrogation to cast doubt on the clarity of an initial, unambiguous request. *See* Smith v. Illinois, 469 U.S. 91, 100 (1984) (per curiam).

Examples of ambiguous requests for counsel which permit continued questioning include: "I don't know if I need a lawyer, maybe I should have one, but I don't know if it would do me any good at this point[.]" United States v. Mendoza-Cecelia, 963 F.2d 1467, 1472 (11th Cir. 1992); "[O]fficer, what do you think about whether I should get a lawyer?" Towne v. Dugger, 899 F.2d 1104, 1107 (11th Cir. 1990); "Maybe I should talk to a lawyer." *Davis*, 512 U.S. at 455; "I want a lawyer" and "I want a public defender." Commonwealth v. Hubble, 504 A.2d 168, 173 (Pa. 1986); "Didn't you tell me I had the right to an attorney?" Poyner v. Murray, 964 F.2d 1404, 1410 (4th Cir. 1992); Defendant "asking how long it would take if she wanted a lawyer and if she would have to stay in jail while she waited for a lawyer[.]" United States v. Lux, 905 F.2d 1379, 1382 (10th Cir. 1990); Defendant stating that "he didn't have a lawyer, that he was going to get a lawyer. But he didn't know the guy's name." United States v. Scarpa, 897 F.2d 63, 66 (2d Cir. 1990); "I can't afford a lawyer bu is there anyway I can get one?" Lord v. Duckworth, 29 F.3d 1216, 1220 (7th Cir. 1994). *Se also* United States v. Uribe-Galindo, 990 F.2d 522, 526 (10th Cir. 1993) (stating th defendant asked the officer "if at some time he wanted an attorney, could he stop answerin questions"); Connecticut v. Barrett, 479 U.S. 523, 525 (1987) (noting that defendant stated would not give the police any written statement in the absence of his attorney but volunteer that he had no problem in talking about the incident).

As with the right to silence, once the defendant invokes his Fifth Amendment right to counsel, he may not be questioned[68] directly or through the use of undercover agents or informants.[69] And, just as with the right to silence, the bar on questioning applies to both charged crimes[70] and uncharged crimes—whether related or unrelated to the charged crimes.[71] Finally, just as with the right to remain silent, a suspect can be questioned after an invocation of the right to counsel if the suspect reinitiates contact himself or if the suspect leaves custody.[72]

For examples of statements unambiguously invoking the Fifth Amendment right to counsel and requiring that all questioning cease, see Edwards v. Arizona, 451 U.S. 477, 479 (1981) ("I want an attorney before making a deal."); United States v. Giles, 967 F.2d 382, 384 (10th Cir. 1992) (noting that defendant asked when he would be given an opportunity to speak with an attorney); Cannady v. Dugger, 931 F.2d 752, 755 (11th Cir. 1991) ("I think I should call my lawyer . . . ."); Robinson v. Borg, 918 F.2d 1387, 1391 (9th Cir. 1990) ("I have to get me a good lawyer, man. Can I make a phone call?"); Smith v. Endell, 860 F.2d 1528, 1529 (9th Cir. 1988) ("Can I talk to a lawyer? At this point, I think maybe you're looking at me as a suspect, and I should talk to a lawyer. Are you looking at me as a suspect?"); Commonwealth v. Zook, 553 A.2d 920, 922 (Pa. 1989) (stating that defendant requested a chance to call his mother to see if she could get him an attorney).

[68] When a suspect invokes the Fifth Amendment right to counsel, officials must stop questioning him but need not provide him with an attorney at that point. *See* Markman, *supra* note 2, at 195 n.11.

[69] *See* Illinois v. Perkins, 496 U.S. 292, 300 (1990).

[70] *See Edwards*, 451 U.S. at 482.

[71] *See* Arizona v. Roberson, 486 U.S. 675, 682 (1988).

[72] If the defendant reinitiates contact on his own, he can be questioned if he then makes a knowing and voluntary waiver of his Fifth Amendment right to counsel. The defendant reinitiates contact if he, directly or indirectly, shows a willingness and desire for a generalized discussion about the investigation and is not merely making a routine inquiry such as for a drink or use of a telephone. For example, a defendant reinitiated contact on the way to the jail when he said, "Well, what is going to happen to me now?" Oregon v. Bradshaw, 462 U.S. 1039, 1045 (1983). Similarly, a defendant reinitiated when, sitting with an agent waiting to be arraigned, he shook his head and stated he could not believe he was in all this trouble for fifty dollars. *See* United States v. Montana, 958 F.2d 516, 519 (2d Cir. 1992).

Of course, not every comment by a suspect to an official constitutes reinitiation. For example, a suspect does not reinitiate contact by indicating a desire to keep belongings separate from those of a co-defendant, *see* United States v. Soto, 953 F.2d 263, 265 (6th Cir. 1992); by asking a co-defendant, "Did you tell him everything?" in front of an officer, Desire v. Attorney Gen. of Cal., 969 F.2d 802, 804 (9th Cir. 1992); or by asking, "Where are my children?" Jacobs v. Singletary, 952 F.2d 1282, 1294 (11th Cir. 1992).

It is not always easy to determine whether a comment by a suspect constitutes reinitiation. In one case, the court found a close question where an officer on another matter said to the suspect who was in a holding area, "I know you." The suspect responded, "Come here, I want to talk to you a minute[,]" and then, "I want to talk to you about getting me

Unlike with the right to silence, however, a suspect's question-proof status from invocation of the right to counsel does not end with the passage of time or with a significant change of circumstances during the time the suspect remains in custody. Once the Fifth Amendment right to counsel is invoked, the suspect remains question-proof, and officials may not reinitiate contact with him for the entire time that he remains in custody,[73] even if he meets with an attorney as he had requested.[74]

Thus, of the three rights that can confer a question-proof status, it is the Fifth Amendment right to counsel that has the greatest impact on the investigation of unsolved, uncharged crimes. The Sixth Amendment right to counsel places no impediment at all on the investigation of uncharged crimes. The question-proof status from an invocation of the Fifth Amendment right to silence lapses so quickly that it is not a huge obstacle to the investigation of

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arrested." United States v. Whaley, 13 F.3d 963, 964 (6th Cir. 1994).

However, confronting a defendant with incriminating evidence probably constitutes improper reinitiation and interrogation by the officials. Thus, a defendant's statements made in response to seeing or hearing about the evidence will not be considered a result of the defendant's reinitiation and will be barred. *See, e.g.*, Combs v. Wingo, 465 F.2d 96, 99 (6th Cir. 1972) ("The only possible object of showing the ballistics report to the appellant . . . was to break him down and elicit a confession from him. The question was implied if not spoken. Everything was there but a question mark. It was a form of question and got the desired result."); United States v. Barnes, 432 F.2d 89, 91 (9th Cir. 1970) (police brought accomplice into room with defendant so that she could repeat her confession to defendant); State v. Nixon, 599 A.2d 66, 67 (Me. 1991) (police placed diagram of crime scene in front of defendant); State v. Ward, 573 A.2d 505, 507-08 (N.J. Super. Ct. App. Div. 1990) (defendant was shown photographs of accomplices); People v. Ferro, 472 N.E.2d 13, 17 (N.Y. 1984) (improper reinitiation by placing furs stolen from the victim in front of defendant's cell). Even if a suspect should reinitiate contact, the police may lose the right to seek a waiver and interrogate if they wait too long before responding to the reinitiation. *See Whaley*, 13 F.3d at 968 (noting that police did not try to question the defendant until three weeks after his alleged reinitiation).

[73] Of course, officials cannot release a defendant on a pretextual basis merely to allow his invocation to lapse and then immediately pick him up and again question him. *See supra* note 59. *But cf.* Whren v. United States, 116 S. Ct. 1769, 1774 (1996) (stating that constitutional reasonableness of car stop did not depend on actual motivation of the officer). However, in holding a defendant and responding to bail requests for a person charged with a minor crime but who is a potential suspect for a more serious crime, officials will certainly consider that a break in custody will void the invocation. Of course, when officials talk to the suspect during his next period in custody, they will have to administer the warnings again and the suspect may simply, again, invoke his right to counsel.

[74] *See* Minnick v. Mississippi, 498 U.S. 146, 153 (1990). *Minnick* was such a dramatic extension of the *Edwards* protection, that even some of *Miranda*'s strongest supporters took issue with the court's holding. *See* Kamisar, *supra* note 16, at 24.

uncharged crimes. An invocation of the Fifth Amendment right to counsel, covering all crimes and lasting as long as a defendant is in custody, is most likely to preclude officials from approaching a suspect about a new crime under investigation.

III. THE COSTS AND BENEFITS OF MIRANDA

While the debate has subsided somewhat over whether the now thirty year old *Miranda* decision should be overruled or retained,[75] dispute rages on about how to interpret virtually every part of *Miranda* and its progeny.[76] The matter of how long an inmate should remain question-proof is best resolved in a manner that minimizes the costs while maximizing the benefits of the *Miranda* rules.[77]

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[75] "Few today continue to question either the policy basis for the opinion or its staying power . . . . It is not the wisdom of the Court that should be debated, but rather the application of the decision." Paul Marcus, *A Return to the "Bright Line Rule" of* Miranda, 35 WM. & MARY L. REV. 93, 94 (1993); *see* H. RICHARD UVILLER, TEMPERED ZEAL 196 (1988) ("It is too late in the game to reargue the anomalies of the *Miranda* solution to the troubling problem of confessions."); *see also* Rhode Island v. Innis, 446 U.S. 291, 304 (1980) (Burger, C.J., concurring) ("I would neither overrule *Miranda*, disparage it, nor extend it at this late date."). *But see* Gerald M. Caplan, *Questioning* Miranda, 38 VAND. L. REV. 1417, 1418–19 (1985) ("*Miranda* seems to have won acceptance, even approval, extending beyond what its stormy past would have indicated . . . [but] although the hour is late, a case can be made for overruling *Miranda*. *Miranda* was not a wise or necessary decision, nor has *Miranda* proved to be, as is generally contended, a harmless one.").

While many courts display little enthusiasm for applying all of the *Miranda* requirements, "academic writers are virtually unanimous in urging that *Miranda* should be strengthened and extended." *Id.* at 1426 n.47 (collecting literature from 1967 to 1981); *see also* Cassell, *supra* note 14, at 389 (noting that legal academics generally view *Miranda* as having a "'negligible' effect on law enforcement"). Articles like Professor Caplan's urging the overruling of *Miranda* or, as this Article urges, more restrictive readings, are in the minority but find a receptive audience with at least some of the exasperated judges who must struggle with *Miranda*'s rules. *See* HAROLD J. ROTHWAX, GUILTY: THE COLLAPSE OF CRIMINAL JUSTICE (1996) (relying extensively on the scholarship of Professors Caplan and Grano, frequent critics of *Miranda*).

[76] Professor Caplan's description of *Miranda* is as true now as it was a decade ago. "*Miranda* retains its celebrity status. It is our best known criminal case. Not only in name, but in the rights it accorded to criminal suspects, it has become part of our common awareness." Caplan, *supra* note 75, at 1418.

[77] *See* United States v. Willoughby, 860 F.2d 15, 23 (2d Cir. 1988) ("[F]idelity to the doctrine announced in *Miranda* requires that it be enforced strictly, but only in those types of situations in which the concerns that powered the decision are implicated.") (quoting Berkemer v. McCarty, 468 U.S. 420, 437 (1984)); *cf.* Henry J. Friendly, *The Fifth*

There are two sets of benefits achieved by application of the *Miranda* rules. The first, and more important, set of benefits is obtained by protecting the core values of the Fifth Amendment's Self-Incrimination Clause.[78] The second set of benefits is obtained by choosing to protect the core values with bright-line, prophylactic rules rather than case-by-case analysis.[79] *Miranda*'s cost consists of the burdens placed on law enforcement, and ultimately society, in making it difficult or impossible to convict guilty persons in cases where confessions are excluded or never given.[80]

Miranda's costs and benefits are best understood with reference to the Court's review of confession claims both before and after the decision. *Miranda* was the first case to apply the privilege against self-incrimination to statements

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Amendment Tomorrow: The Case for Constitutional Change, 37 U. CIN. L. REV. 671, 679–81, 698 (1968) ("Reexamination of the policies of the privilege is not a task undertaken with alacrity. . . . But it is indispensable to any reconsideration of the proper scope of the fifth amendment and peculiarly necessary because of the extent to which eloquent phrases have been accepted as a substitute for thorough thought.").

[78] *Miranda* was the first case to make the Self-Incrimination Clause applicable to pre-trial interrogation. The Fifth Amendment itself was incorporated and made applicable to the states only two years before *Miranda*, in *Malloy v. Hogan*, 378 U.S. 1, 8 (1964). Before *Malloy*, the Fifth Amendment could be considered with regard to pre-trial confessions only in federal cases. *Id.* at 16.

Of course, the Court reviewed confessions long before *Malloy* made the Fifth Amendment applicable to state cases, and *Miranda* made the Self-Incrimination Clause applicable, in both state and federal court, to pre-trial interrogation. Before *Malloy* and *Miranda*, confessions in state cases were reviewed for voluntariness under the Fourteenth Amendment's due process requirement. For both Fourteenth Amendment and Fifth Amendment voluntariness inquiries, the Court employed a case-by-case analysis in which it reviewed the totality of the circumstances. *See, e.g.*, Haynes v. Washington, 373 U.S. 503, 513–14 (1963); Chambers v. Florida, 309 U.S. 227, 238–40 (1940); Brown v. Mississippi, 297 U.S. 278, 286–87 (1936). The Court first adopted the voluntariness requirement for confessions, as a matter of federal law, in *Hopt v. Utah*, 110 U.S. 574, 587 (1884), and soon thereafter found that the common law requirement of voluntariness was constitutionally required in federal courts under the Fifth Amendment. *See* Bram v. United States, 168 U.S. 532, 542 (1897).

[79] *See Minnick*, 498 U.S. at 153–56.

[80] Usually, the needs of law enforcement are relied on as the basis for limiting *Miranda*. Justice Scalia, in the context of vehemently opposing the expansion of *Miranda* that created the problem of the perpetually question-proof suspect, argued that suspects too would benefit if confessions were encouraged. He asserted: "While every person is entitled to stand silent, it is more virtuous for the wrongdoer to admit his offense and accept the punishment he deserves. Not only for society, but for the wrongdoer himself, admissio[n] of guilt . . . advances the goals of both justice *and* rehabilitation." *Id.* at 167 (Scalia, J., dissenting) (internal quotation marks and citations omitted) (alterations in original).

obtained through pre-trial, custodial interrogation. Before *Miranda*, confessions were reviewed for voluntariness under the Due Process Clauses of the Fifth and Fourteenth Amendments.[81] Voluntariness was measured using a totality of the circumstances analysis to determine if "the interrogation was deemed unreasonable or shocking, or if the accused clearly did not have an opportunity to make a rational or intelligent choice."[82]

Miranda provided a whole new framework for evaluating the admissibility of confessions.[83] Even voluntary statements could be admitted only if the police followed the Court's new procedural safeguards, which included the administration of warnings about the right to remain silent and the right to counsel.[84]

In reviewing the admissibility of confessions, the post-*Miranda* Court has treated involuntariness for due process purposes and compulsion for self-incrimination purposes as very similar matters. Even if involuntariness and compulsion are not interchangeable, many of the same values underlie both of these constitutional concerns.[85] Thus, inquiry into the values promoted by *Miranda* is aided by a review of both the pre-*Miranda* voluntariness cases and the post-*Miranda* compulsion cases.

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[81] Beginning in 1936 with *Brown v. Mississippi*, 297 U.S. 278, 285–87 (1936), the Court reviewed the voluntariness of dozens of state confessions under the Due Process Clause of the Fourteenth Amendment. The Court's basis for review of federal confessions in the pre-*Miranda* years was unclear. The Court largely ignored *Bram v. United States*, 168 U.S. 532, 565 (1897), in which it found that an involuntary confession could be excluded under the Fifth Amendment's Self-Incrimination Clause. Instead, the Court appeared to rely on the Fifth Amendment's Due Process Clause in deciding the federal cases. *See* Lawrence Herman, *The Unexplored Relationship Between the Privilege Against Compulsory Self-Incrimination and the Involuntary Confession Rule (Part II)*, 53 OHIO ST. L.J. 497, 499–500 (1992).

[82] New York v. Quarles, 467 U.S. 649, 661 (1984) (O'Connor, J., concurring and dissenting).

[83] "*Miranda* strove to substitute doctrinal tranquility for doctrinal turmoil, concrete guidelines for fact-dependent generalities, and rigid application for flexible normative judgment." Joseph D. Grano, Miranda v. Arizona *and the Legal Mind: Formalism's Triumph Over Substance and Reason*, 24 AM. CRIM. L. REV. 243, 244–45 (1986).

[84] *See* Miranda v. Arizona, 384 U.S. 436, 444–45, 471–73 (1966).

[85] *See* Herman, *supra* note 81, at 501 ("The history of the constitutional protections [for due process and against self-incrimination] suggests similarity.").

A. *The First Set of* Miranda *Values: Core Fifth Amendment Values*

1. *Uncertainty About the Rationale for the Self-Incrimination Clause*

To determine whether *Miranda* advances the values underlying the Self-Incrimination Clause, one must know what those values are. The language of the Self-Incrimination Clause prohibits "compelled" confessions.[86] In *Miranda*, the Court concluded that custodial interrogation is so inherently coercive that the likelihood of compelled confessions was unacceptably great.[87] The purpose of the *Miranda* requirements was, thus, to "dispel the compulsion inherent in custodial surroundings."[88] While the Court has repeatedly and consistently stated that the chief purpose of *Miranda* is to prevent compelled confessions,[89] those statements go no further than the words of the Clause and do little to explain what makes a confession compelled and what values are served by prohibiting compelled confessions.

For a constitutional right seemingly held in such high regard over the centuries, the rationale for the Self-Incrimination Clause is surprisingly difficult to pinpoint. There is little agreement on the chief rationale for the Clause[90] or even whether there is any rationale for the Clause.[91] A good portion of the

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[86] *See* U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."). Of course, the Clause does not specifically refer to confessions. *Miranda* expanded the scope of the Self-Incrimination Clause from the courtroom to the pre-trial interrogation room. *See Miranda*, 384 U.S. at 467.

[87] *See Miranda*, 384 U.S. at 467.

[88] *Id.* at 458.

[89] *See, e.g.*, Arizona v. Mauro, 481 U.S. 520, 529 (1987); Moran v. Burbine, 475 U.S. 412, 425 (1986) ("The purpose of the *Miranda* warnings . . . is to dissipate the compulsion inherent in custodial interrogation . . . ."); Berkemer v. McCarty, 468 U.S. 420, 433 (1984) (purpose of *Miranda* safeguards is to relieve the "inherently compelling pressures" of custodial interrogation) (quoting *Miranda*, 384 U.S. at 467); Estelle v. Smith, 451 U.S. 454, 467 (1981) (stating that the "purpose of [the *Miranda*] admonitions is to combat what the Court saw as 'inherently compelling pressures' at work on the person") (quoting *Miranda*, 384 U.S. at 467).

[90] *Compare* Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 922–27 (1995) (concluding that reliability is the best rationale for the Clause), *with* Yale Kamisar, *On the "Fruits" of* Miranda *Violations, Coerced Confessions, and Compelled Testimony*, 93 MICH. L. REV. 929, 936–41 (1995) (criticizing Amar and Lettow and concluding that the chief concern is whether the suspect's will was overborne by police methods that are intolerable and involved compulsion, regardless of whether or not the confession is reliable).

[91] *See* Amar & Lettow, *supra* note 90, at 889–99; *see also* Dolinko, *supra* note 51, at 1065–70; Donald A. Dripps, *Foreword: Against Police Interrogation—And the Privilege*

controversy over *Miranda* must be traced to the widely divergent views of the rationale for and scope of the Self-Incrimination Clause on which *Miranda* is precariously built.

2. *Historical Rationales for the Self-Incrimination Clause*

a. *The Reliability Rationale for the Self-Incrimination Clause*

Perhaps the most obvious value of the prohibition on compelled confessions is that it protects the integrity of the fact-finding process by insuring the reliability or trustworthiness of confessions. The very phrase "compelled confessions" conjures up the specter of suspects beaten, threatened, or otherwise treated so horrendously that they are willing to confess to anything, notwithstanding their innocence, simply to end their mistreatment.[92] Police interrogation must be limited because of the danger of false confessions.[93]

The reliability rationale is more starkly presented in the pre-*Miranda* voluntariness cases, which were decided when physical abuse of suspects was far more common. In these cases, involving facts far more egregious than those found in contemporary cases, the Court often explicitly relied on the reliability rationale to exclude the confession.[94]

b. *The Police Methods Rationale for the Self-Incrimination Clause*

The Court has excluded confessions as involuntary even where the

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Against Self-Incrimination, 78 J. CRIM. L. & CRIMINOLOGY 699, 715–18 (1988). *But see* Robert S. Gerstein, *Privacy and Self-Incrimination*, 80 ETHICS 87, 87–88 (1970); Stephen J. Schulhofer, *Some Kind Words for the Privilege Against Self-Incrimination*, 26 VAL. U. L. REV. 311, 325–33 (1991).

[92] *See* Ward v. Texas, 316 U.S. 547, 555 (1942) (concluding that police actions made the defendant "willing to make any statement that the officers wanted him to make").

[93] *See* Welsh S. White, *False Confessions and the Constitution: Safeguards Against Unworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105, 138–42 (1997); Welsh S. White, *Interrogation Without Questions:* Rhode Island v. Innis *and* United States v. Henry, 78 MICH. L. REV. 1209, 1209 n.4 (1980) [hereinafter White, *Interrogation*] ("Those who have sought to limit police interrogation believe that interrogation, often carried out in secret, involves coercion, and often yields false confessions.").

[94] *See, e.g.*, White v. Texas, 310 U.S. 530, 533 (1940) (involving a prisoner whose confession was obtained after a Texas Ranger repeatedly brought the prisoner into the woods at night and whipped him); Brown v. Mississippi, 297 U.S. 278, 285–87 (1936) (holding that a conviction resting solely on confessions procured by brutal whippings violated the defendants' due process rights).

reliability of the confession was not seriously in doubt.[95] In such cases, the Court focused on the outrageousness of the police methods in obtaining the confession and excluded the confession notwithstanding evidence of reliability.[96]

Miranda itself contains few specific references to the reliability concern.[97] The Court did not dwell on the details of the confessions in question and whether they were corroborated by other evidence in the cases. Instead, the Court focused on the nature of police interrogation tactics. Thus, the *Miranda* Court appeared greatly interested in limiting certain police tactics even apart from reliability concerns.[98]

But, even when it scrutinized police methods while declining to evaluate the reliability of the resulting confession, the Court did not jettison reliability concerns. The reliability concern underlies the Court's discussions of police methods even when the Court says little or nothing about the reliability of the confession in any particular case. Reliability remains a concern because of the high correlation between: (1) tactics that could cause an innocent person to

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[95] In *Lisenba v. California*, 314 U.S. 219 (1941), the Court sought to distinguish common law voluntariness, in which reliability was the overriding concern, from due process standards. *See id.* at 229–41. The Court stated that the "aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false." *Id.* at 236. Although the Court seemed to be expressing a concern beyond reliability, it provided little explanation of when the admission of a reliable confession would create "fundamental unfairness."

[96] *See, e.g.*, Watts v. Indiana, 338 U.S. 49, 51–55 (1949) (involving a series of lengthy interrogations that occurred over seven days); Ashcraft v. Tennessee, 322 U.S. 143, 153–56 (1944) (involving 36 hours of continuous questioning). In *Rochin v. California*, 342 U.S. 165, 173 (1952), the Court expressly stated:

> Use of involuntary verbal confessions in State criminal trials is constitutionally obnoxious not only because of their unreliability. They are inadmissible under the Due Process Clause even though statements contained in them may be independently established as true. Coerced confessions offend the community's sense of fair play and decency.

See also Rogers v. Richmond, 365 U.S. 534, 541 (1961) (holding that involuntary confessions must be excluded even if reliable "because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system . . . .").

[97] That the *Miranda* Court's reference to the reliability value was confined largely to a footnote referring to the possibility of false confessions, *see* Miranda v. Arizona, 384 U.S. 436, 455 n.24 (1966), reveals that the Court was concerned with some Fifth Amendment values beyond the reliability of confessions.

[98] *See id.* at 445–55.

confess in at least some cases, and (2) tactics that are considered so outrageous that they render a statement involuntary, notwithstanding any reliability based on other evidence.[99] A tactic that would never cause an innocent person to confess falsely may be considered sneaky or mean, but is probably not so outrageous as to be constitutionally barred.

However, even this general reliability concern with regard to future suspects does not fully explain the Court's refusal to permit certain police tactics during interrogation. There may still be police practices that would rarely cause an innocent person to falsely confess but that, nevertheless, will be deemed to render a confession unconstitutionally involuntary or compelled. The *Miranda* Court's extensive discussion of the many potential evils of police interrogation suggests that the Court believed that some forms of interrogation are intolerable under the Self-Incrimination Clause even if they would result in reliable confessions.[100]

A few years before *Miranda*, in *Spano v. New York*,[101] the Court specifically distinguished the reliability concern from the police methods concern. In excluding the defendant's confession, the Court stated that confessions are excluded as involuntary not only because of their "inherent untrustworthiness" but also because of "the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves."[102] For example, a physical assault of any kind is almost surely constitutionally prohibited. Thus, a rap on the knuckles, like those that some schoolteachers once administered, might be constitutionally barred even though it is unlikely to cause an innocent person to confess.

Many of the Court's statements in the "police methods" cases suggest that

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[99] In a pre-*Miranda* article on the voluntariness standard, Professor Yale Kamisar described the cases as decided based on two reliability standards. The first standard considered whether the confession of a particular defendant, given that defendant's individual characteristics, might be unreliable. The second standard considered whether the police tactic used might make some innocent defendant confess even if there was no concern about the reliability of the instant confession. *See* Yale Kamisar, *What Is an Involuntary Confession? Some Comments on Inabu and Reid's Criminal Interrogation and Confessions*, 17 RUTGERS L. REV. 728, 755 (1963).

[100] *See Miranda*, 384 U.S. at 445–55. The Court may be concerned with outrageous interrogation tactics even in a case where the confession is reliable because the Court wants to deter tactics that will far more often lead to unreliable confessions. Thus, the general statements about what police behavior can be tolerated in a fair system may, at bottom, reflect a concern with unreliability.

[101] 360 U.S. 315 (1959).

[102] *Id.* at 320–21.

certain conduct by officials simply cannot be tolerated as fair and just in a civilized society, even if it will result in reliable confessions.[103] Over the years, the Supreme Court, lower courts, and numerous commentators have suggested rationales for prohibiting certain police tactics independent of any reliability concerns.[104] When all is said and done, much of the voluminous rhetoric boils down to the view that we should prohibit police officers from using tactics that, in a gut-level sense, are generally considered unfair. That is, some police tactics strike the average person, or at least the Court, as outrageous and unacceptable.

c. *Other Rationales for the Self-Incrimination Clause*

Some of the rhetoric of the Court and commentators suggests a rationale for barring compelled confessions apart from concerns with either reliability or patently outrageous police actions. For example, some commentators have urged reliance on the Self-Incrimination Clause to equalize the allegedly unequal hands held by a suspect and the state.[105] The *Miranda* Court itself referred to the value the Fifth Amendment privilege serves in maintaining a "fair state-individual balance."[106] There are also many urgent descriptions, in the cases and the literature, of our accusatorial rather than inquisitional system of criminal justice.[107] The *Miranda* Court itself stated that "our accusatory

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[103] Much of the debate over how *Miranda*'s rules should be interpreted centers on how one defines coercion. Professor Grano has persuasively argued that the term "coercion" is simply a shorthand means of referring to the "normative or policy determination relating to '*how much* pressure on the suspect [is] permissible.'" Grano, *supra* note 83, at 260–61 (alteration in original) (quoting *Miranda*, 384 U.S. at 507 (Harlan, J., dissenting)).

[104] *See, e.g.*, Jackson v. Denno, 378 U.S. 368, 386–87 (1964) (stating that confessions obtained through coercion are contrary to "the strongly felt attitude of our society that important human values are sacrificed where an agency of the government . . . wrings a confession out of an accused against his will") (quoting Blackburn v. Alabama, 361 U.S. 199, 206–07 (1960)); Kamisar, *supra* note 90, at 936–49 (discussing the greater, systemic implications that would arise if involuntary confessions were admissible); Welsh S. White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581, 584 (1979) ("[T]he Court will measure the police conduct against certain basic standards of fairness that are fundamental to our system of justice. . . . [E]ven reliable confessions should be inadmissible when they are induced by modes of police trickery that are inconsistent with basic notions of fairness.").

[105] *See* Amar & Lettow, *supra* note 90, at 891 (positing that a "possible rationale [for the Fifth Amendment] taps into ideas about parity and symmetry").

[106] Miranda v. Arizona, 384 U.S. 436, 460 (1966) (quoting 8 WIGMORE, EVIDENCE 317 (McNaughton rev. 1961)).

[107] *See, e.g.*, Withrow v. Williams, 507 U.S. 680, 691–92 (1993); McNeil v. Wisconsin, 501 U.S. 171, 189 (1991) (Stevens, J., dissenting); Arizona v. Fulminante, 499 U.S. 279, 293 (1991) (White, J., dissenting); Pennsylvania v. Muniz, 496 U.S. 582, 595 n.8

system of justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth."[108] The goal appears to be to make the state work harder to prove its case by depriving it of any assistance from the suspect.[109]

But even this goal rests, in part, on the reliability concern. When deprived of opportunities to easily obtain confessions, the state will work harder to find the true perpetrators of crimes and, even when the confessor is the true perpetrator, to find other strong evidence that will insure a conviction at trial. The overriding concern, however, of those seeking to equalize the scales is not reliability, but the notion that it is simply not fair for the state to rely on the defendant to prove its case. Nonetheless, virtually all of the Court's cases can be explained with regard to either the reliability or the police methods concern. Despite the Court's emphasis on these two concerns, some commentators continue to urge the Court to consider values beyond reliability and protection from outrageous police conduct.[110]

Based on the Court's broadest statements about the limits on interrogation,

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(1990); Illinois v. Perkins, 496 U.S. 292, 301 (1990) (Brennan, J., concurring); Doe v. United States, 487 U.S. 201, 212 (1988); Moran v. Burbine, 475 U.S. 412, 468 (1986) (Stevens, J., dissenting); Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964); Rogers v. Richmond, 365 U.S. 534, 540–41 (1961); Gregory W. O'Reilly, *England Limits the Right to Silence and Moves Towards an Inquisitorial System of Justice*, 85 J. CRIM. L. & CRIMINOLOGY 402 (1994).

[108] *Miranda*, 436 U.S. at 460 (citing Chambers v. Florida, 309 U.S. 227, 235–38 (1940)). The Court showed a similar antipathy to confessions when it stated in *Escobedo v. Illinois*, 378 U.S. 478, 488–89 (1964), that "a system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation." Some commentators have suggested that the Self-Incrimination Clause is grounded in the notion that "government impermissibly disrespects a person when it uses him as the means of his own destruction." Amar & Lettow, *supra* note 90, at 892. Professor Welsh White has asserted that the Fifth Amendment provides a basis for prohibiting many widely-used interrogation techniques because "criminal suspects have a right to be treated in a manner that reflects a concern for their dignity as human beings." White, *supra* note 104, at 628. He suggests that "a basic postulate of the fifth amendment is a concern for protecting the dignity of the individual." *Id.*

[109] Of course, this goal would seem to have had far more appeal in the long-ago days when defendants were not allowed to testify at their own trials. *See* Amar & Lettow, *supra* note 90, at 891–92 (concluding that any rationale based on a need to equalize the positions of the defendant and the state is now "obsolete").

[110] *See* Charles J. Ogletree, *Are Confessions Really Good for the Soul?: A Proposal to Mirandize* Miranda, 100 HARV. L. REV. 1826, 1830 (1987) (urging an "unambiguous per se rule prohibiting police interrogation without the presence of counsel").

some commentators have suggested that the Fifth Amendment prohibition on compelled confessions is intended not only to insure the reliability of confessions and patently outrageous conduct, but also to discourage all uncounseled confessions.[111] The most sweeping view of a Fifth Amendment value independent of reliability would place great, if not total, limits on the ability of the police to question suspects. Even if the Court ever viewed the Fifth Amendment privilege as a means of equalizing the state and individual positions, the Court today views the constitutional provision as serving a more limited purpose.

3. *The Court's Current View of the Rationale for the Self-Incrimination Clause*

The post-*Miranda* Court has specifically recognized the importance of confessions[112] and has shown little interest in discouraging interrogation beyond

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[111] *See* White, *Interrogation*, *supra* note 93, at 1209 n.4 ("[S]ociety carries the burden of proving its charge against the accused not out of his own mouth . . . but by evidence independently secured through skillful investigation.") (quoting Watts v. Indiana, 338 U.S. 49, 54 (1949). Some commentators have concluded that the *Miranda* Court's goal was simply to limit interrogation as much as possible and deter as many suspects as possible from giving confessions. *See* Caplan, *supra* note 75, at 1448–50.

[112] *See* Moran v. Burbine, 475 U.S. at 426 ("Admissions of guilt are more than merely 'desirable[;]' they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law."); Oregon v. Elstad, 470 U.S. 298, 305 (1985) ("[F]ar from being prohibited by the Constitution, admissions of guilt by wrongdoers, if not coerced, are inherently desirable.") (quoting United States v. Washington, 431 U.S. 181, 187 (1977)); Hoffa v. United States, 385 U.S. 293, 311 (1966) (noting that certain information might only be gathered by a companion turned government informant); Culombe v. Connecticut, 367 U.S. 568, 588–92 (1961) (recognizing the importance of confessions in the criminal justice system). *But see* Escobedo v. Illinois, 378 U.S. 478, 488–89 (1964) ("[A] system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation.").

At least some members of the Court have taken an increasingly favorable view of the importance of confessions. *See, e.g.*, *McNeil*, 501 U.S. at 181 ("[T]he ready ability to obtain uncoerced confessions is not an evil but an unmitigated good . . . ."); *cf.* Minnick v. Mississippi, 498 U.S. 146, 167 (1990) (Scalia, J., dissenting) ("While every person is entitled to stand silent, it is more virtuous for the wrongdoer to admit his offense and accept the punishment he deserves. Not only for society, but for the wrongdoer himself, 'admissio[n] of guilt . . . , if not coerced, [is] inherently desirable,' because it advances the goals of both 'justice *and* rehabilitation.'") (alterations in original) (citation omitted); Michigan v. Tucker, 417 U.S. 433, 448 n.23 (1974) ("[C]ompletely voluntary confessions may . . . advance the cause of justice and rehabilitation . . . .").

the point at which the confessions obtained are not reliable. Thus, the Court has acknowledged that, while convictions should and do require more than just the bare admissions of a defendant, there are many cases in which investigation, no matter how skillful or technically advanced, cannot substitute for the defendant's own confession as a basis for proving guilt beyond a reasonable doubt.[113]

Given this view, it is not surprising that the Court has significantly expanded the original *Miranda* rights only rarely, most notably in *Edwards v. Arizona*.[114] Far more often, the Court has denied requests to expand *Miranda*'s protections or even to implement broad aspects of *Miranda* that had seemed fairly well-established in the Court's original language.[115]

While the Court is unwilling to discourage all confessions, it still seems to view some interrogation procedures as so onerous that they deprive the individual of free choice even while resulting in a confession that happens to be reliable.[116] Yet the post-*Miranda* Court has spent little time specifically explaining why certain interrogation tactics should be prohibited even if the resulting confession is reliable.[117] The Court has spoken of tactics that have

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[113] *See* Cassell, *supra* note 14, at 466–70 (observing that confessions remain vitally important in solving many cases notwithstanding scientific techniques for investigating crimes, and calculating that a confession is needed for conviction in 24% of all cases).

[114] 451 U.S. 477 (1981); *see* Minnick v. Mississippi, 498 U.S. 146, 156 (1990) (retaining *Edwards* bar on interrogation even after defendant meets with counsel); Arizona v. Roberson, 486 U.S. 675, 687–88 (1988) (holding that *Edwards* bars police-initiated interrogation following a suspect's request for counsel in a separate, independent investigation).

[115] *See, e.g.*, Davis v. United States, 512 U.S. 452, 461–62 (1994) (holding that *Miranda* rights are invoked only by an unambiguous assertion); *Elstad*, 470 U.S. at 307 (holding that a confession obtained in violation of *Miranda* was admissible as impeachment evidence); New York v. Quarles, 467 U.S. 649, 657–59 (1984) (recognizing a public safety exception to *Miranda*); Oregon v. Bradshaw, 462 U.S. 1039, 1045–46 (1983) (taking an expansive view of what constitutes an initiation of further conversation by the defendant after he has invoked his *Miranda* rights); Michigan v. Tucker, 417 U.S. 433, 450–52 (1974) (admitting testimony of a witness whose identity was revealed through a *Miranda*-defective statement); Harris v. New York, 401 U.S. 222, 225–26 (1971) (holding that *Miranda*-defective statements could be used for impeachment purposes).

[116] Commentators have suggested that the Fifth Amendment serves a value independent of reliability by stating that it is "unseemly" of the police to "take advantage of the psychological vulnerabilities of a citizen." Stephen J. Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 872 (1981); *see also* Caplan, *supra* note 75, at 1454 n.183 ("Professor Griswold has called the privilege 'one of the greatest landmarks in man's struggle to make himself civilized . . . .'").

[117] Scattered comments by Justices have indicated that *Miranda* helps effectuate some Fifth Amendment values beyond the reliability of confessions. For example, Justice Marshall

"overborne" the will of a defendant.[118] Whether or not a person's will has been overborne cannot be measured empirically. Instead, notions of what tactics will overbear free will, and thus render a confession involuntary, must be determined by reference to society's general view of what is fair and just.

At bottom, the Court has rejected any notion of the Fifth Amendment discouraging all confessions, but the Court continues to view some police tactics as potentially outrageous even when reliability is not the chief concern. In sum, there are two Fifth Amendment values served by the *Miranda* decision. First, there is the value in insuring the reliability of confessions. Second, there is the value of limiting police interrogation tactics that are offensive even though they may result in reliable confessions in some cases.[119] The Court's post-*Miranda* cases have emphasized the reliability rationale, with its concern that certain tactics could result in unreliability by causing an innocent person to confess falsely.

If the Court were concerned only with protecting the core value of the Fifth Amendment in each case, then a case-by-case analysis, like the pre-*Miranda* voluntariness test, would serve that purpose.[120] But the difficulty and uncertainty of applying the voluntariness test led the Court to conclude that the test for evaluating confessions should promote values in addition to the core Fifth Amendment values.

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explained that the Fifth Amendment "also ensures that criminal investigations will be conducted with integrity and that the judiciary will avoid the taint of official lawlessness." *Quarles*, 467 U.S. at 687 (Marshall, J., dissenting).

[118] *See* Withrow v. Williams, 507 U.S. 680, 685 (1993) (claim that repeated promises of lenient treatment had overborne defendant's will); Arizona v. Fulminante, 499 U.S. 279, 288 (1991) (threat of physical violence had overborne defendant's will); Schneckloth v. Bustamonte, 412 U.S. 218, 225–26 (1973) (listing factors courts consider in determining if "a defendant's will was overborne").

[119] In addition to insuring reliability and protecting against outrageous police tactics, the Fifth Amendment may also protect against those rare instances in which a confession can be defined as physically involuntary without regard to reliability or to judgments about which police tactics should be deemed unacceptably outrageous. In *Townsend v. Sain*, 372 U.S. 293 (1963), *overruled on other grounds by* Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992), the defendant's confession was suppressed because he had been given a truth serum. *See id.* at 307–09. The reliability of the confession was not in issue and the police had not even known about the drug's effect. *See id.* Although this would seem to constitute a case of actual involuntariness, the Court later characterized it as a case involving police misconduct. *See* Colorado v. Connelly, 479 U.S. 157, 164–65 (1986).

[120] *See* Dix, *supra* note 16, at 248–49.

B. *The Second Set of* Miranda *Values: Guidance and Certainty*

In jettisoning the case-by-case voluntariness standard in favor of *Miranda*'s prophylactic, bright-line rules, the Court decided to protect not only the core values of the Fifth Amendment itself, but also a secondary set of values associated with all bright-line or per se rules. This secondary set of values includes the provision of guidance to law enforcement actors and the conservation of judicial resources.

1. *Guidance for Police Officers*

Bright-line rules generally offer more guidance to police officers than does case-by-case analysis. Officers are more likely to understand bright-line rules and to apply them correctly.[121] If officers see that evidence is excluded when clear rules are violated, they are more likely to comply with the rules. Officers who find that case-by-case analysis offers them little guidance on what they may do and has little predictive value on which statements will be excluded, have little incentive to conform their future behavior to the case law.[122]

The *Miranda* Court concluded that the voluntariness test offered the police inadequate guidance. As Professor Schulhofer explained:

> *The standard left police without needed guidance* Because of its vagueness and its insistence on assessing "the totality of the circumstances," the voluntariness standard gave no guidance to police officers seeking to ascertain what questioning tactics they could use. Indeed, at the critical point when the police sensed that a suspect was about to "crack," they were enjoined to be on guard against both "overbearing the will" and losing their chance by lessening the tension or pressure; in many common situations the message of the due process test was not just vague but inherently contradictory.[123]

There are still strong voices urging that the voluntariness test, either as it stood before *Miranda* or as it would have developed in the absence of *Miranda*, does offer an appropriate level of guidance to police officers. The Court has

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[121] *See* Dunaway v. New York, 442 U.S. 200, 213–14 (1979) (observing that clear rules are needed "to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront"); *cf.* Phyllis T. Bookspan, *Reworking the Warrant Requirement: Resuscitating the Fourth Amendment*, 44 VAND. L. REV. 473, 474 (1991) (noting that with regard to the Fourth Amendment, "the Court has rendered amorphous case-by-case, fact-specific adjudications").

[122] *See* Dix, *supra* note 16, at 229.

[123] Schulhofer, *supra* note 116, at 869.

concluded, however, that "*Miranda*'s holding has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation . . . ."[124]

2. *Guidance for Courts: Ease of Application*

The second value served by the bright-line nature of the *Miranda* rules is the conservation of resources in the judicial system. Judges and litigants should need to devote far less time and effort to claims made under bright-line rules than under case-by-case analysis.[125] Opponents of the voluntariness test assert that trial courts could not be given an "accurate picture of what happened at the police station" given the subtlety and sophistication of police interrogation techniques.[126] Moreover, they argue that the pre-*Miranda* voluntariness test left appellate courts "so wholly at sea that the appearance of principled judicial decision-making inevitably suffered, whether or not they chose to hold the confession inadmissible."[127] Finally, they argue that the voluntariness test left courts with so few standards that there were "disproportionate demands for case-by-case review in the federal courts."[128]

C. *The Costs of* Miranda

The ideal rule for reviewing the admissibility of confessions would be one that protected the values of the Fifth Amendment, provided the benefits of all

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[124] Fare v. Michael C., 442 U.S. 707, 718 (1979).

[125] *See* Dix, *supra* note 16, at 229.

[126] Welsh S. White, *Defending* Miranda*: A Reply to Professor Caplan*, 39 VAND. L. REV. 1, 7–8 (1986) ("[L]ong before *Miranda*, it was widely recognized that, in most cases, the adversary process was not equipped to give anything close to an accurate picture of what happened at the police station. . . . [A] verbal account of what the police said or did to a suspect does not reflect the atmosphere created in the interrogation room."). There is widespread agreement that coercion now rarely consists of physical violence. Because psychological coercion leaves no observable effect after interrogation and because virtually all confessions are taken behind closed doors, there is little research on the actual incidence of different types of allegedly coercive conduct by the police. While not constitutionally required, videotaping interrogations and the resulting confessions could provide much of this information. *See* Cassell, *supra* note 14, at 496–97.

[127] Schulhofer, *supra* note 116, at 869–70; *see* Michigan v. Mosley, 423 U.S. 96, 113 (1975) (Brennan, J., dissenting) ("[U]nder *Miranda*, the cost of assuring voluntariness by procedural tests, independent of any actual inquiry into voluntariness, is that some voluntary statements will be excluded.").

[128] Stephen J. Schulhofer, *Reconsidering* Miranda, 54 U. CHI. L. REV. 435, 451 (1987).

bright-line rules, and exacted few costs.[129] This ideal rule would mandate suppression only when a confession was actually compelled. Unfortunately, there is no simple rule that would mandate suppression only in the cases implicating core Fifth Amendment values. To protect the Fifth Amendment privilege with bright-line rules, the *Miranda* Court created rules that are prophylactic.

The *Miranda* rules are prophylactic because they mandate suppression in a larger number of cases than those actually implicating the core value of the Fifth Amendment privilege. The rules "overprotect"[130] by mandating suppression in some cases in which the bright-line rules were violated but the Fifth Amendment was not.[131] Moreover, the rules exact another substantial cost

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[129] In addition to the core Fifth Amendment values and the bright-line values, *Miranda* supporters see importance in retaining *Miranda* for its symbolic value. *Miranda* has been lauded "as a symbol of our commitment to maintaining a fair system of criminal procedure that seeks to implement the protections embodied in the federal constitution." White, *supra* note 126, at 21. Supporters of *Miranda* characterize it as an important "constitutional commitment to limited government; it provides a measure of reassurance to arrested suspects who may fear abuse . . . ." Schulhofer, *supra* note 128, at 460. These supporters argue that overriding *Miranda* would "convey the message that restraints on police interrogation have been largely abandoned." White, *supra* note 126, at 22.

[130] Duckworth v. Eagan, 492 U.S. 195, 209 (1989) (O'Connor, J., concurring).

[131] "The academic debate concerning these so-called 'prophylactic' rules has been intense." Marcus, *supra* note 75, at 93 n.5. *Compare* Schulhofer, *supra* note 128, at 435 (supporting the *Miranda* rules and positing that they do not go far enough), *with* Joseph D. Grano, Miranda*'s Constitutional Difficulties: A Reply to Professor Schulhofer*, 55 U. CHI. L. REV. 174 (1988) [hereinafter Grano, *Reply*] (attacking Professor Schulhofer's attempts to defend the *Miranda* rules).

"Critics of prophylactic rules have questioned the legitimacy of judicial development of such rules, especially when courts are acting on the basis of constitutional prohibitions against compelling persons to make self-incriminating admissions." Dix, *supra* note 16, at 230; *see also* Department of Justice, Office of Legal Policy, *"Truth in Criminal Justice" Series: The Law of Pretrial Interrogation*, 22 U. MICH. J.L. REFORM 437 (1989); Grano, *Reply*, *supra*; Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100 (1985) (identifying prophylactic rules in criminal procedure and explaining their constitutional legitimacy). *But see* David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190 (1988) (arguing that prophylactic rules are a central and necessary feature of constitutional law).

The characterization of the rules as prophylactic may encourage Congress to try to resurrect 18 U.S.C. § 3501 (1994), which purported to overrule *Miranda*. *See* Grano, *Reply*, *supra*, at 176–77 ("A prophylactic rule in the constitutional context is a court-created rule that can be violated without violating the Constitution itself."); Grano, *supra* note 83, at 252–53 ("[T]he Court does not have authority to disregard the constitutional issue as basically irrelevant in the case under review. This, of course, is precisely what *Miranda*'s prophylactic

in lost confessions. The required warnings persuade some suspects not to give confessions in circumstances where they otherwise would have given voluntary, reliable statements.[132]

Thus, much of the cost imposed by *Miranda*[133] is attributable to the prophylactic quality needed to serve the second set of values, those concerned with the bright-line nature of rules. There are few costs associated with *Miranda*'s protection of the core values of the Fifth Amendment. To the extent

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rule does.").

The Court has expressly found that *Miranda*'s rules are only prophylactic and not constitutionally required. *See* Michigan v. Tucker, 417 U.S. 433, 450–52 (1974) (holding that the fruit of the poisonous tree doctrine is inapplicable to *Miranda* violation). The Court further explained in *Oregon v. Elstad*, 470 U.S. 298, 306–07 (1985), that the *Miranda* exclusionary rule "serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself. It may be triggered even in the absence of a Fifth Amendment violation. . . . *Miranda*'s preventive medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm." *See also* Michigan v. Harvey, 494 U.S. 344, 351 (1990) ("The prosecution must not be allowed to build its case against a criminal defendant with evidence acquired in contravention of constitutional guarantees and their corresponding judicially created protections. But use of statements so obtained for impeachment purposes is a different matter."); Duckworth v. Eagan, 492 U.S. 195, 203 (1989) ("The prophylactic *Miranda* warnings are 'not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected.'") (quoting *Tucker*, 417 U.S. at 444); Connecticut v. Barrett, 479 U.S. 523, 528 (1987) ("By prohibiting further interrogation after the invocation of [the *Miranda*] rights, we erect an auxiliary barrier against police coercion."); New York v. Quarles, 467 U.S. 649, 654 (1983) ("Requiring *Miranda* warnings before custodial interrogation provides 'practical reinforcement' for the Fifth Amendment right.") (In his dissenting opinion in *New York v. Quarles*, Justice Marshall agreed that *Miranda*'s prophylactic rule is "overbroad in that its application excludes some statements made during custodial interrogations that are not in fact coercive . . . ." 467 U.S. at 684 n.7 (Marshall, J., dissenting)). Statements obtained in violation of *Miranda*, but not the Fifth Amendment, are admissible for impeachment purposes. *See* Oregon v. Hass, 420 U.S. 714, 722–23 (1975); Harris v. New York, 401 U.S. 222, 224–26 (1971).

[132] *See* JOSEPH D. GRANO, CONFESSIONS, TRUTH, AND THE LAW 202 (Univ. of Mich. Press 1993); Cassell, *supra* note 14, at 394 (stating that lost confessions must be included in an accounting of *Miranda*'s true costs); Richard A. Leo, *The Impact of* Miranda *Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 677 (1996) (noting that in a recent study, a quarter of the suspects invoked their *Miranda* rights).

[133] In discussing the costs of *Miranda*, this Article is referring to the costs of *Miranda* in comparison to a case-by-case analysis or some other means of protecting the Fifth Amendment privilege. The Fifth Amendment itself, under any test, already exacts "a costly price" by allowing both the innocent and guilty to decline to speak with the police or testify at trial. *See* Caplan, *supra* note 75, at 1467 ("In evaluating the privilege against self-incrimination, we should start with the premise that the privilege shelters the guilty.").

that a confession is excluded in furtherance of the Fifth Amendment's value on reliability, there is no cost. An unreliable confession has no value to law enforcement or society. To the extent that a seemingly reliable confession is excluded because of truly outrageous interrogation tactics, the cost is probably not substantial. If there is sufficient other evidence to demonstrate that the confession is reliable, the confession is probably not essential to the prosecution, and the conviction of a guilty person probably will not be lost because the confession is excluded.

Reliable, voluntary confessions taken in violation of the *Miranda* rules are excluded to promote the values associated with bright-line rules.[134] Likewise, under *Miranda*, many suspects who would have given reliable, voluntary confessions are persuaded by the prophylactic warning to say nothing. Excluding reliable evidence or preventing its very creation, in order to promote the values associated with bright-line rules, makes it difficult or impossible to prosecute some criminals.[135] Society suffers the costs of unsolved crimes, of future crimes by criminals left on the street, and of disrespect and scorn for laws that seem arbitrary and for law enforcement officials who seem

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[134] *See* Duckworth v. Eagan, 492 U.S. 195, 209 (1989) (O'Connor, J., concurring) ("[T]he *Miranda* rule 'overprotects' the value at stake. In the name of efficient judicial administration of the Fifth Amendment guarantee and the need to create institutional respect for the Fifth Amendment values, it sacrifices society's interest in uncovering evidence of crime and punishing those who violate its laws.").

One argument to defend the cost imposed by *Miranda*'s prophylactic nature is that the Court has imposed prophylactic rules in regard to many issues other than confessions. For example, in *Gideon v. Wainwright*, 372 U.S. 335 (1963), the Court created a prophylactic rule that an indigent defendant must be provided with counsel without reference to whether her intelligence, experience, education, and other characteristics truly require that she have counsel in order to have a fair trial. *See id.* at 344. But the prophylactic rule of *Gideon* is far different from the prophylactic rule of *Miranda*. First, *Gideon*'s rule truly is bright-line while *Miranda* is subject to endless litigation. Second, the costs of the two rules are very different. Because it is easy to comply with *Gideon*, few cases are lost after conviction. Moreover, the cost before conviction is strictly one of finance—paying the lawyer. *Miranda*'s prophylactic rules are so fuzzy that convictions are often overturned. Furthermore, the pre-conviction cost cannot even be measured in dollars and cents. *Miranda*'s cost is lost convictions and the release of criminals who, but for the *Miranda* requirements, would have given a statement deemed admissible under the constitutional voluntariness standard.

[135] *See* Withrow v. Williams, 507 U.S. 680, 702 (1993) (O'Connor, J., concurring and dissenting) (noting the substantial costs imposed by the prophylactic nature of the *Miranda* rules); New York v. Quarles, 467 U.S. 649, 656–57 (1984) ("The *Miranda* majority, however, apparently felt that whatever the cost to society in terms of fewer convictions of guilty suspects, that cost would simply have to be borne in the interest of enlarged protection for the Fifth Amendment privilege.").

ineffectual.[136] In the years since *Miranda* was decided, the Court has seemed increasingly unsure that the benefits of *Miranda* truly outweigh its costs.[137] For

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[136] The difficulties in quantifying the costs of *Miranda* have proved prodigious. *See* George C. Thomas III, *Is* Miranda *a Real-World Failure? A Plea for More (and Better) Empirical Evidence*, 43 UCLA L. REV. 821, 823 (1996) (noting the lack of studies measuring *Miranda*'s "real-world empirical effect"). Commentators have made general judgments. *See, e.g.*, Stephen J. Markman & Paul Marcus, Miranda *Decision Revisited: Did It Give Criminals Too Many Rights?*, 57 UMKC L. REV. 15, 17 (1988) (characterizing studies as showing that the "harm to the effectiveness of police investigation has been extreme"); White, *supra* note 126, at 17 ("[T]he studies show that *Miranda* has had relatively little effect on law enforcement."). Recently, there has been a resurgence in interest in empirical research on the question. Professor Paul G. Cassell, in particular, has relied heavily on the empirical studies to criticize *Miranda*. *See* Cassell, *supra* note 14, at 394–437; Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of* Miranda*'s Defenders*, 90 NW. U. L. REV. 1084, 1087–115 (1996); Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990's: An Empirical Study of the Effects of* Miranda, 43 UCLA L. REV. 839 (1996) (discussing a study the authors conducted on police questioning and suspects' confessions in a sample of over two hundred cases).

Researchers can scarcely agree on what they should try to measure. For example, one commentator finds the cost of *Miranda* to be relatively low by pointing to figures showing only one to two percent of cases affected by illegal confessions. *See* Marcus, *supra* note 75, at 143 & n.258 (citing Tamar Jacoby, *Fighting Crime by the Rules: Why Cops Like* Miranda, NEWSWEEK, July 18, 1988, at 53). Of course, even one or two percent of thousands, if not hundreds of thousands, of cases each year constitutes a significant amount of cases. Moreover, other researchers have focused their attention on attempting to quantify how many more confessions would have been given but for the *Miranda* rules. *See, e.g.*, Cassell, *supra* note 14, at 394.

[137] It has proven exceedingly difficult to quantify those costs. Most of the studies attempting to do so were done shortly after the *Miranda* decision and found a measurable effect on law enforcement. "The study that best measures *Miranda*'s impact on crime detection was conducted in Pittsburgh" and was published in 1967. Caplan, *supra* note 75, at 1464. It compared the difference in confession rates before and after *Miranda*. Confessions declined 16.9% from 54.4% of all cases to 37.5%. For robberies and burglaries, the rate went from 60% to 40%. The researchers estimated that in 20% of all cases, the officials need a confession for a conviction and that in 25% of all cases with confessions, the confession was needed for conviction. *See id.* at 1464–67. Of course, this study was done and the estimates on the need for confessions were made long before technical advances in crime detection such as DNA analysis may have made confessions essential in fewer cases.

There are a number of variables that have not been, and practically speaking cannot be, quantified in the studies. For example, some studies have presented figures showing that there is a small percentage of convictions after a trial at which the confession was essential. *See* George C. Thomas III, *An Assault on the Temple of* Miranda, 85 J. CRIM. L. & CRIMINOLOGY 807, 813 n.26 (1995) (book review). But these studies do not show how many of the vast number of guilty pleas were obtained only because of the existence of a confession

example, in 1979, the Court reviewed the benefits offered by the prophylactic nature of the *Miranda* rules and then explained that this "gain in specificity . . . has been thought to outweigh the burdens that the decision in *Miranda* imposes on law enforcement agencies and the courts by requiring the suppression of trustworthy and highly probative evidence even though the confession might be voluntary under traditional Fifth Amendment analysis."[138] This is hardly a rousing endorsement of the cost-benefit decision made in *Miranda*.

Miranda will be retained as long as the Court believes that the bright-line benefits it offers outweigh the costs imposed.[139] Assuming *Miranda*'s continued existence, unresolved ambiguities with regard to its prophylactic rules are likely to be resolved in a manner that preserves bright-line benefits while imposing as few costs as possible on law enforcement.

The cost of suppressing statements that were not involuntary but were obtained in violation of the prophylactic rules accounts for the enormous amount of litigation over *Miranda* issues. Within the great mass of *Miranda* cases, the largest group concerns the question of when, if ever, officers may resume questioning a suspect who has invoked the right to counsel.[140] The issue addressed by this Article—when an inmate may be questioned after he has invoked the right to counsel—is raised in a particularly troubling subset of this large group of cases.

D. *Limiting the Costs of* Miranda

Proponents of a return to the case-by-case analysis of the voluntariness standard point out that *Miranda*'s purportedly bright-line rules have become so

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or other statement.

[138] Fare v. Michael C., 442 U.S. 707, 718 (1979). *But cf.* Withrow v. Williams, 507 U.S. 680, 691–95 (1993) (retaining habeas review of *Miranda* claims in part because *Miranda*, unlike the Fourth Amendment, does serve to exclude often unreliable evidence).

[139] In continuing to interpret the *Miranda* rules, the Court has clearly found that the costs of *Miranda* must be considered. *See, e.g.*, Davis v. United States, 512 U.S. 452, 461 (1994) ("In considering how a suspect must invoke the right to counsel, we must consider the other side of the *Miranda* equation: the need for effective law enforcement."); Maine v. Moulton, 474 U.S. 159, 180 (1985) (noting that the public has a legitimate "interest in the investigation of criminal activities").

[140] *See* Dix, *supra* note 16, at 230 ("Probably the most litigated of the federal constitutional bright line prophylactic rules is the *Miranda* requirement, reaffirmed in *Edwards v. Arizona*, that until counsel is physically present, officers cannot resume interrogation of a suspect who has invoked the right to counsel."). This fact is hardly surprising since the *Edwards v. Arizona* line of cases provides by far the most defense-oriented approach to the many *Miranda* issues.

fuzzy and muddied that their dictates are now far from clear and that the amount of litigation about confessions could hardly increase.[141] Thus far, however, *Miranda* has persevered and seems in little immediate danger of being completely overruled.[142] In analyzing how the Court should ultimately resolve the matter of questioning incarcerated suspects, this Article suggests a means for furthering the core values of the Fifth Amendment without allowing application of *Miranda*'s prophylactic rules to work absurd results in the name of bright-line values.

IV. PROBLEMATIC APPROACHES TO RESOLVING THE ISSUE OF QUESTIONING INCARCERATED SUSPECTS

A. *Using a Totality of the Circumstances Test to Review Questioning*

One way to limit the duration of an inmate's question-proof status from an invocation of the right to counsel would be to adopt a totality of the circumstances test for determining how long a defendant remains question-proof. Under a totality of the circumstances test, the passage of time and the

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[141] In 1984, Justice O'Connor said that "the meaning of *Miranda* has become reasonably clear and law enforcement practices have adjusted to its strictures." New York v. Quarles, 467 U.S. 649, 663 (1984) (O'Connor, J., concurring and dissenting) (quoting Rhode Island v. Innis, 446 U.S. 291, 304 (1980) (Burger, C.J., concurring)). By 1993, however, she had concluded that *Miranda*'s bright-line tests were far from bright. She observed that:

> *Miranda* creates as many close questions as it resolves. The task of determining whether a defendant is in "custody" has proved to be "a slippery one." And the supposedly "bright" lines that separate interrogation from spontaneous declaration, the exercise of a right from waiver, and the adequate warning from the inadequate, likewise have turned out to be rather dim and ill-defined.

Withrow v. Williams, 507 U.S. 680, 711 (1993) (O'Connor, J., concurring and dissenting) (citation omitted).

[142] Some of *Miranda*'s staying power must be attributed to the fact that it is not a pure bright-line test. The bright-line rules are triggered by the threshold requirements of custody and interrogation. The existence of these threshold requirements is determined by totality of the circumstances tests and not by bright-line tests. If the goals of guidance and ease of application had been considered truly paramount, the *Miranda* Court could have established bright-line tests even for these threshold requirements. For example, the Court could have simply said that any time a police officer communicates with a person, the person must be warned. Such bright-line rules might be easy to understand, but would be extremely burdensome. Instead, the Court chose to retain case-by-case analysis with regard to critical components of the *Miranda* requirements.

opportunity to meet with counsel would be important factors in allowing reinitiation after invocation of the right to counsel. Use of this test would avoid the need to determine whether incarceration always constitutes custody. Even if incarceration were always considered custody, a suspect's question-proof status could end under a totality of the circumstances even though the suspect never experienced a break in custody.

Such a totality of the circumstances test is already employed to determine the duration of a person's question-proof status triggered by an invocation of the right to silence.[143] There is certainly great appeal to using the same test to determine the duration of a suspect's question-proof status under either the Fifth Amendment right to silence or the Fifth Amendment right to counsel. The current application of the totality of the circumstances test to only the right to silence leads to a great disparity in the protection afforded by the two Fifth Amendment rights. When a suspect invokes his Fifth Amendment right to silence, his question-proof status from invocation of that right can end in just a few hours, even if he remains in custody. Yet, under the rule of some lower courts that incarceration always constitutes custody,[144] the question-proof status resulting from invocation of the Fifth Amendment right to counsel can last months, years, or even a lifetime. It is anomalous that one Fifth Amendment right creates a no-contact rule that can expire in a couple of hours while the other creates a no-contact rule that can last a lifetime.

Nevertheless, the Court seems to see a huge difference between the two Fifth Amendment rights with regard to reinitiation by officials after an invocation. Few suspects, however, know that there is a dramatic difference in the effect of an invocation of the two rights. Few know that a vehement, "Don't you ever talk to me," leaves them question-proof for just a few hours, while a tentative, "I think I will talk to my lawyer now," may leave them question-proof for years if they remain in custody.

Of course, acknowledging that the disparity in the reinitiation rules for the two Fifth Amendment rights may be unwarranted is far easier than determining which rule, if either, should prevail. The long-lasting no-contact rule used for the right to counsel already places a great burden on law enforcement and is not needed to adequately protect the right to silence.[145] On the other hand, application in the right to counsel context of the totality of the circumstances test now used in the right to silence context would be problematic for other reasons. First, the case-by-case analysis of the totality of the circumstances test provides

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[143] *See supra* Part II.B.

[144] *See infra* note 170.

[145] *But see* Marcus, *supra* note 75, at 145 (suggesting that the two rights be treated the same by barring resumption of questioning after invocation of either the right to silence or the right to counsel).

little guidance to law enforcement officials on when a defendant may be reapproached for questioning. Second, and more importantly, experience with invocations of the right to silence reveals that the totality of the circumstances test would not be particularly protective of the right to counsel. The test has been used to allow the question-proof status from an invocation of the right to silence to end rather quickly.[146]

Application of the totality of the circumstances test in the right to counsel context would cause a substantial contraction of the protections now given to individuals who invoke the right to counsel. Under a totality of the circumstances test, a defendant's question-proof status would probably end not only when he became a sentenced inmate but within days or even hours of the invocation of the right to counsel. Moreover, expanding the opportunities to question inmates by applying a totality of the circumstances test after invocation of the right to counsel would require the Court to overrule its well-established decision in *Edwards v. Arizona*.[147] By contrast, this Article's proposal that lower courts recognize that there is a difference between incarceration and *Miranda* custody would expand interrogation opportunities without requiring the Court to overhaul much of its *Miranda* jurisprudence. The approach suggested in this Article would leave suspects highly protected while they are still in the station house but would not grant some of them a question-proof status for their entire period of incarceration as a sentenced inmate.

B. *Viewing Incarceration as Per Se Custody*

The matter of questioning incarcerated suspects after an invocation of the right to counsel could also be resolved by following the lead of *Green* and the other courts that have expressly considered the issue.[148] These courts have assumed that incarceration is per se custody, continuous incarceration constitutes continuous custody, a continuously incarcerated defendant experiences no break in custody, and an inmate remains question-proof after invoking the right to counsel for the entire duration of his incarceration.

Courts that have summarily deemed all inmates to be in custody have overlooked the need to retain a totality of the circumstances approach for determining custody if *Miranda* is to be applied sensibly. There are few factors that are dispositive of the custody question. Presence in a police station or placement in a patrol car are important factors in a determination of custody, but neither alone ends the inquiry.[149] Courts must still determine whether the

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[146] *See supra* note 62.

[147] 451 U.S. 477 (1981).

[148] *See* cases cited *supra* note 11.

[149] *See* Oregon v. Mathiason, 429 U.S. 492, 495 (1977) (per curiam) (defendant

person was in an inherently coercive environment.

Likewise, presence in a prison facility should not end the custody inquiry. Although the fact of incarceration may be a very important factor in the custody inquiry, courts should still consider all of the circumstances to determine if the inmate was continuously subjected to those coercive forces from which *Miranda* offers protection.

A per se rule that incarceration constitutes custody does little to advance the goals of *Miranda* but exacts a high price on society. By determining custody based on a totality of the circumstances test in which incarceration is an important but not dispositive factor, courts can minimize the costs of *Miranda* while still advancing its goals.

The greatest virtue of a rule equating incarceration with custody would be that it is a bright-line rule and, thus, should provide the benefits of all bright-line rules in terms of guidance and ease of application.[150] A perpetual bar on questioning an inmate who once invoked the right to counsel does permit a rule that is easily stated. That a rule may be easily stated, though, does not mean that it clearly guides conduct. Application of a long-lasting bar on questioning inmates is enormously difficult in practice. In determining how to proceed during an investigation in which an inmate becomes a suspect, a police officer would have to find out when, if ever, the inmate had invoked his right to counsel with regard to any crime and when, if ever, the inmate had been released from incarceration. This can be a highly formidable task.[151] Many incarcerated suspects will have previously been convicted or at least questioned about numerous other crimes. Many will have been convicted or questioned in far flung parts of the country over the course of many years by law

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questioned in police station was not in custody); United States v. Ospina, 679 F. Supp. 402, 408 (D. Del. 1988) (defendant not in custody when placed in patrol car for "safety and convenience reasons" during a traffic stop in bad weather).

[150] A bright-line test deeming incarceration to be per se custody would have the effect of greatly limiting the questioning of inmates after an invocation of the right to counsel. Of course, the Court could also fashion other bright-line tests that would have ease of application to recommend them, but that would result in greatly expanded opportunities to question incarcerated suspects. For example, the Court could overrule *Minnick v. Mississippi*, 498 U.S. 146 (1990), adopt the bright-line test rejected there, and find that the question-proof status ends not only with a break in custody but after the defendant has met with her attorney as she requested.

A somewhat more protective variation of the bright-line approach rejected in *Minnick* would allow officials to reapproach a suspect once she has met with counsel as requested, but also require additional, protective procedures before any questioning. To insure a truly voluntary waiver by the suspect, these procedures could include warnings more extensive than those already contained in the standard *Miranda* warnings.

[151] *See supra* note 24.

enforcement officials from many different jurisdictions. It will often be virtually impossible to determine whether a suspect who has been incarcerated for a number of years has ever invoked his right to counsel and whether he has had any periods of non-confinement after the invocation.[152]

Equating incarceration with *Miranda* custody does little to advance the Fifth Amendment goal of insuring the reliability of confessions. The *Miranda* Court's concerns with the effects of custody have far less relevance when the suspect is in a prison facility as a sentenced inmate than when he is in a police station house for the express purpose of questioning and processing. In considering station house interrogation, the Court explained that "such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner."[153] The defendant in the station house interacts with government officials only with regard to the status of criminal charges that are pending or under investigation. Inmates, however, interact with government officials, with regard to all the routine matters of life—food, clothing, hygiene, training, and education. The vast majority of a sentenced inmate's time is not spent being interrogated or being processed for pending charges. Although prison can be an exceedingly unpleasant and stressful place, that fact alone does not mean that all inmates are always in custody for *Miranda* purposes.

The *Miranda* Court's description of custody in the station house hardly describes the life of most sentenced inmates. A suspect at the station house has been "thrust into an unfamiliar"[154] and "police-dominated atmosphere"[155] where he is "surrounded by antagonistic forces"[156] and "deprived of every psychological advantage."[157] The defendant in the station house is isolated; he is usually deprived of contact with anyone but his potential interrogators. He has no occasion to engage in conversation with friends or acquaintances about anything unrelated to the predicament in which he finds himself. Moreover, the suspect in the station house may well believe that interrogation will continue as long as he remains in the station house. The suspect knows he is there for only

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[152] The benefits of the bright-line *Edwards* bar on questioning are much more apparent with regard to the recently arrested suspect being questioned at the station house. The suspect's non-custodial status before arrest relieves the questioning officer of any need to determine whether the suspect had ever requested the right to counsel in the past.

[153] Miranda v. Arizona, 384 U.S. 436, 457 (1966).

[154] *Id.* at 457.

[155] *Id.* at 456.

[156] *Id.* at 461.

[157] *Id.* at 449. "*Miranda* on its facts applies to station house questioning, but [the Court has] not so limited it in [its] subsequent cases, often over strong dissent." New York v. Quarles, 467 U.S. 649, 654 n.4 (1984).

one purpose—to be questioned. The station house is both unfamiliar and threatening; there is little or no occasion for a suspect to engage in any of the basic routines of life such as eating a hot meal, sleeping in a bed, reading a book, or writing a letter.

Incarceration in a correctional facility does not impose on inmates the unrelenting feeling of isolation and powerlessness[158] that deprives the suspect in the station house of the ability to exercise his free will and make his own decision on whether or not to speak with officials about an investigation.[159] The admitted rigors of prison life do not automatically deprive a person of the ability to decide whether to speak with officials. At the station house, the suspect is consumed with anxiety about what will happen with regard to the crimes under investigation. After conviction, an inmate does not suffer this disabling anxiety.

The incarceration equals custody rule is also unnecessary to advance the Fifth Amendment value of deterring outrageous police tactics. Although numerous police tactics have the potential to overbear the will of a suspect, the Court gave special recognition to the tactic of badgering a defendant who invokes his right to counsel. It created the *Edwards* prophylactic rule against resuming questioning, after an invocation of the right to counsel, for as long as the defendant remains in custody.[160] The *Edwards* prophylactic rule is quite

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[158] *See* Ogletree, *supra* note 110, at 1837 (recognizing that a coercive environment arises from the "feeling of powerlessness that inherently emerges from being placed in custody in a hostile environment").

[159] *Cf.* Florida v. Bostick, 501 U.S. 429, 436–37 (1991) (holding that although he might not have felt free to leave, a bus passenger was not in the custody of officers because he would have been free to decline to speak with the officers).

> Many of the psychological ploys discussed in *Miranda* capitalize on the suspect's unfamiliarity with the officers and the environment.... [T]he possibility that terminating the meeting would have led to revocation of probation was not comparable to the pressure on a suspect who is painfully aware that he literally cannot escape a persistent custodial interrogator.

Minnesota v. Murphy, 465 U.S. 420, 433 (1984).

[160] *See* Michigan v. Harvey, 494 U.S. 344, 350 (1990) ("*Edwards* established another prophylactic rule designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights."); McNeil v. Wisconsin, 501 U.S. 171, 177 (1991) (reiterating the Court's statement in *Harvey*); Smith v. Illinois, 469 U.S. 91, 98 (1984) ("In the absence of such a bright-line prohibition, the authorities through 'badger[ing]' or 'overreaching'—explicit or subtle, deliberate or unintentional—might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance."). Like *Miranda*, the *Edwards* rule "is not itself required by the Fifth Amendment's prohibition on coerced confessions, but is instead justified only by reference to

broad. In the context of station house questioning, however, it is reasonably tailored to the goal of preventing badgering. It prevents the police from reapproaching a defendant, even after he has met with counsel, within hours or days of his invocation of the right to counsel.

But the *Edwards* prophylactic rule can hardly be defended as protection against badgering when the reapproach occurs months or years after the initial invocation of the right to counsel. At this point, officials cannot be accused of badgering if they wish to approach an inmate, provide him with his *Miranda* warnings, and give him the opportunity to once again invoke his right to counsel if he does not wish to speak with them about the crime under investigation.

Thus, a purportedly bright-line rule that incarceration always constitutes custody does not advance either the core values of the Fifth Amendment or the benefits usually associated with the bright-line nature of the rule. Moreover, the high cost of such a rule far outweighs any marginal benefits.

Imposing a bright-line rule to keep inmates question-proof creates especially high *Miranda* costs. There may be a small number of cases, relative to the total number of crimes investigated, in which officials wish to question an inmate as a suspect in a crime committed long ago. Yet common sense dictates that this relatively small group of cases is likely to involve serious matters where the cost to society of leaving the crime unsolved and the perpetrator unprosecuted is quite high. The police will rarely continue for months or years to investigate minor crimes. The police will continue to investigate only very serious crimes because society has a strong interest in having them solved. Moreover, the perpetrator's confession may be especially necessary for conviction in a case in which, presumably, so little other evidence had been found that it remained unsolved long after its commission. As evidence is lost and witnesses' memories fade, a suspect's confession will be a particularly important piece of evidence for prosecution.

A bright-line rule that all incarceration is custody simply removes the custody requirement for a significant group of cases and imposes the potentially burdensome *Miranda* rules even when there is actually no custody; in these instances, the Fifth Amendment values do not require *Miranda*'s expansive protection. The protections of *Miranda* and its progeny of bright-line rules, such as the *Edwards*[161] rule, already exact a high cost to advance the values associated with bright-line tests. It is important to limit the costs of *Miranda* by not imposing additional bright-line tests.[162] The use of a totality of the

its prophylactic purpose." Connecticut v. Barrett, 479 U.S. 523, 528 (1987).

[161] Edwards v. Arizona, 451 U.S. 477 (1981).

[162] *See* Minnick v. Mississippi, 498 U.S. 146, 163–68 (1990) (Scalia, J., dissenting) (arguing that extension of the *Edwards* prohibition is the latest stage of "prophylaxis built

circumstances test for determining custody serves to keep the costs of *Miranda* from escalating well beyond the benefits it provides.

A per se rule that incarceration constitutes custody would turn the prophylactic *Edwards* rule into "a laser, burning inexorably through form and substance into infinity."[163] By recognizing that incarceration is just one factor in the totality of the circumstances determination of custody, courts can retain the bright-line rules of *Miranda* and *Edwards*, appropriately protect the values underlying those rules, and avoid placing unduly burdensome (and in some cases absurd) limits on law enforcement's efforts to investigate crimes.

Given the high cost of deeming all incarceration to constitute custody, the theoretical ease of applying such a rule is an insufficient basis for adopting the rule.[164] The Court's grant of certiorari in *United States v. Green*[165] strongly

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upon prophylaxis").

[163] Kochutin v. State, 813 P.2d 298, 310 (Alaska Ct. App. 1991) (Bryner, C.J., dissenting), *vacated*, 875 P.2d 778 (Alaska Ct. App. 1994).

[164] The assumed clarity of bright-line tests has caused the Court to limit interrogation in a number of respects. For example, the Court strictly limits the ability of a defendant to waive his right to counsel and speak with law enforcement officials. Thus, a suspect in custody who invokes his Fifth Amendment right to counsel cannot later be approached for a waiver of that right even if he has met with his counsel at length as he requested. *See Minnick*, 498 U.S. at 153. Similarly, a defendant cannot be approached for a waiver of his Sixth Amendment right to counsel once he has had counsel appointed for him. *See* Patterson v. Illinois, 487 U.S. 285, 291 (1988); Michigan v. Jackson, 475 U.S. 625, 636 (1986). Rather than entirely forbidding waiver of these Fifth and Sixth Amendment rights to counsel in some situations, and thereby missing potentially valuable statements, it might be more sensible to allow a waiver to be sought more often but to bolster the *Miranda* protections by requiring additional assurances that any waiver is truly voluntary.

The bright-line limits on a suspect's ability to waive his constitutional rights to counsel and his *Miranda* rights have been defended as offering great protection to the individual. *See Minnick*, 498 U.S. at 155–56; *Edwards*, 451 U.S. at 484–85. Yet, these limits on the ability to waive individual rights tend to lump together all suspects as somewhat incompetent and unable to make a reasonable decision about the exercise of their own rights. At trial, by comparison, a defendant is generally entitled to waive his constitutional right to counsel and represent herself. *See* Faretta v. California, 422 U.S. 806, 807 (1975). This more expansive view of waiver at trial cannot be reconciled with the narrow view of some commentators that there should be a completely non-waivable pre-trial right to counsel for the suspect subject to custodial interrogation. *See* Anne Elizabeth Link, *Fifth Amendment—The Constitutionality of Custodial Confessions*, 82 J. CRIM. L. & CRIMINOLOGY 878, 899 (1992); Ogletree, *supra* note 110, at 1842; Irene Merker Rosenberg & Yale L. Rosenberg, *A Modest Proposal for the Abolition of Custodial Confessions*, 68 N.C. L. REV. 69, 89 (1989). Surely, if a defendant may proceed without counsel at trial, he should also be able to opt to do so pre-trial, before he has even been charged with a crime.

[165] 592 A.2d 985 (D.C. 1991), *cert. granted*, 504 U.S. 908 (1992), *cert. dismissed*, 507

indicates that the Court has concerns about the per se rule used by some lower courts to find that all incarceration constitutes custody and that an inmate's question-proof status can last forever.

V. A BETTER APPROACH: RECOGNIZE THE BREAK IN MIRANDA CUSTODY THAT ENDS THE SUSPECT'S QUESTION-PROOF STATUS

A. *Distinguishing* Miranda *Custody and Incarceration*

In considering whether there is an end to the question-proof status some inmates obtained by invoking the right to counsel, the view that all incarceration constitutes *Miranda* custody leaves those inmates over-protected and law enforcement unnecessarily hampered. Yet application of the totality of the circumstances test to determine when the question-proof status ended would leave the suspects under-protected. Any compromise approach on when to permit the questioning of inmates who have invoked the right to counsel must take account of society's competing interests in protecting individual rights and in investigating crimes.[166] The proper balance would be maintained if officials were permitted to approach, warn, and then question incarcerated suspects whose invocation of the right to counsel was made long ago in regard to a now disposed matter. Under existing law, officials can approach an incarcerated suspect who earlier invoked his right to counsel if that inmate's question-proof status ended with a break in custody between the invocation and the later approach for questioning.[167] Thus, a critical question for law enforcement is whether a continuously incarcerated suspect can experience a break in custody that will leave him available for questioning, notwithstanding his earlier invocation of the right to counsel.[168]

U.S. 544 (1993) (per curiam).

[166] Rules concerning the circumstances under which confessions and other statements may be taken from suspects must be made with a recognition of the value of confessions and other statements in law enforcement. *See* Grano, *supra* note 83, at 266 ("Self-incrimination is not the evil; coerced self-incrimination is."). While technical advances such as DNA analysis are highly reliable, they play a role in only a small number of cases. Standard but less reliable forms of evidence such as eyewitness testimony can more often substitute for confessions but, like confessions, are also subject to the manipulation that makes them sometimes unreliable.

[167] *See supra* note 10.

[168] This Article asserts that the question-proof status of many inmates will end long before the end of their incarceration, because of the existing rule that a person's question-proof status ends with a break in custody. The Court could, of course, fix some point or points other than just a break in custody that would also end the question-proof status of an inmate. There may be events in the life of an inmate, between his initial invocation and his eventual release, that are relevant to whether there is any useful purpose served by retaining

On a superficial review, all incarceration might seem to constitute custody since inmates cannot, of course, leave the facility in which they are incarcerated. But custody in layperson's terms is not necessarily custody for *Miranda* purposes. *Miranda*'s definition of custody reflects a concern more with the coercive forces that may affect interactions between a suspect and an interrogating official, and less with the fact that a person's ability to select his activities and routine is greatly limited as an inmate.

Thus, many courts have convincingly made a distinction between custody for *Miranda* purposes and general prison population confinement.[169] In these cases, the courts justified interrogation undertaken in the absence of any *Miranda* warnings by concluding that the inmates were not entitled to warnings because they were not in custody for *Miranda* purposes. By finding that an inmate can sometimes be incarcerated yet not be in custody, these cases directly support the notion that an inmate can experience a break in custody and lose the question-proof status he obtained when he invoked the right to counsel. The next section will trace the development of this body of cases and explain the way in which many courts have sensibly defined custody so that incarceration is not per se *Miranda* custody.[170]

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the question-proof status that arose upon the invocation and that will definitely end upon release from incarceration.

For example, in *Green*, the government claimed that the defendant's question-proof status should have been deemed to have ended with the entry of his guilty plea on the original drug charges. *See supra* note 9. Sentencing on the original charges or even completion of the direct appeal are other points at which the question-proof status could be deemed ended. Entry of a guilty plea, sentencing on the crime for which the person is incarcerated, or completion of the appellate process, are significant events. Like the final release from prison, these events change the dynamic between the defendant and the authorities so that the defendant should feel far fewer of the coercive forces to speak involuntarily than he might have felt when approached about a new crime by an official while in a pre-trial status on a pending matter. Of course, these points could be months or even years after the invocation but could still be well before the suspect had served his entire sentence and physically left all prison facilities.

[169] *See, e.g.*, People v. Smith, 459 N.Y.S.2d 528, 535 (Sup. Ct. 1983). Some courts have used phrases such as "institutional custody" to distinguish long periods of incarceration from *Miranda* custody. *See* State v. Overby, 290 S.E.2d 464, 465 (Ga. 1982).

[170] A fair number of cases have also assumed or expressly concluded that incarceration is per se *Miranda* custody. *See, e.g.*, Battie v. Estelle, 655 F.2d 692, 697–99 (5th Cir. 1981); Parmigiano v. Baxter, 510 F.2d 534, 536 (1st Cir. 1974), *rev'd on other grounds*, 425 U.S. 308 (1976); United States v. Cadmus, 614 F. Supp. 367, 372 (S.D.N.Y. 1985); Kochutin v. State, 813 P.2d 298, 304 (Alaska Ct. App. 1991), *vacated*, 875 P.2d 778 (Alaska Ct. App. 1994); Bradley v. State, 559 A.2d 1234, 1244 & n.3 (Del. 1989) ("The language of the *Miranda* opinion, which states that the *Miranda* rights must be stated to someone the authorities wish to question after he has been 'taken into custody' implies that any questioning of a prisoner constitutes custodial interrogation," and "[t]he only instance when courts have

B. *Survey of Jurisdictions Addressing the Incarceration as Custody Issue*

The Supreme Court's closest pronouncement on whether incarceration constitutes custody came nearly three decades ago in *Mathis v. United States*.[171] The Court found that a defendant questioned by IRS agents while in state prison should have been given his *Miranda* warnings. Most lower courts have correctly concluded that *Mathis* does not stand for the proposition that every moment of incarceration constitutes *Miranda* custody. As these courts have found, *Mathis* conclusively established only that the incarcerated suspect was in custody at the moment he was interrogated.[172] The *Mathis* Court did not need

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permitted a person to be questioned in prison without receiving his *Miranda* warnings is when the questioning is part of an on-the-scene investigation involving a prison crime."); Staples v. State, 632 So. 2d 1108 (Fla. 1994); Commonwealth v. Perez, 581 N.E.2d 1010, 1016–17 (Mass. 1991); People v. Anderson, 531 N.W.2d 780, 784 (Mich. Ct. App.), *appeal denied*, 543 N.W.2d 316 (Mich. 1995); Commonwealth v. Chacko, 459 A.2d 311, 314 n.2 (Pa. 1983) (collecting cases); State v. Coerper, 531 N.W.2d 614, 618 (Wis. Ct. App. 1995), *aff'd in part, rev'd in part on other grounds*, 544 N.W.2d 423 (Wis. 1996); *see also* United States v. Morales, 834 F.2d 35, 40 (2d Cir. 1987) (Oakes, J., concurring) (concluding that *Miranda* supports a rule that prisoners are per se in custody).

One result of such a view of incarceration is to require that any incarcerated suspect, whether or not he ever invoked his right to counsel, be given his *Miranda* warnings before he is questioned in prison. Requiring the provision of *Miranda* warnings before an interrogation takes place in a prison is a reasonable requirement. Upon being summoned and questioned, an inmate will generally feel sufficiently pressured such that it is reasonable for courts to conclude that he is in custody at that point and to require the usual *Miranda* warnings for all custodial interrogations. Requiring the warnings before interrogation in prison strikes a proper balance between individual rights and law enforcement needs. There should be opportunities to obtain statements from inmates, but only once the inmates know and understand all of their rights.

The balance between individual rights and law enforcement needs is off, however, when all continuous incarceration is viewed as continuous *Miranda* custody so that a long ago invocation of the right to counsel can create a question-proof status that never ends, making some inmates perpetually unapproachable.

[171] 391 U.S. 1 (1968).

[172] *See, e.g.*, Garcia v. Singletary, 13 F.3d 1487, 1489–91 (11th Cir. 1994) (discussing and adopting cases that limit *Mathis*); United States v. Conley, 779 F.2d 970, 972 (4th Cir. 1985) ("declin[ing] to read *Mathis* as compelling the use of *Miranda* warnings prior to all prisoner interrogations and hold[ing] that a prison inmate is not automatically always in 'custody' within the meaning of *Miranda*"); Cervantes v. Walker, 589 F.2d 424, 427 (9th Cir. 1978); Arthur v. State, 575 So. 2d 1165, 1188 (Ala. Crim. App. 1990) ("We do not find *Mathis* to mandate a per se rule that any investigatory questioning inside a prison requires *Miranda* warnings."); People v. Anthony, 230 Cal. Rptr. 268 (Cal. Ct. App. 1986) ("We decline to read *Mathis* to compel that *Miranda* warnings be given to a prisoner or jail inmate

to address whether the defendant had been in custody during the entire period of incarceration prior to the arrival of the agents to interrogate him.[173]

After *Mathis*, numerous state and lower courts expressly held that not all incarceration constitutes *Miranda* custody and that "incarceration does not *ipso facto* render an interrogation custodial."[174] In light of these decisions, Justice

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under all circumstances. A prisoner or one incarcerated in jail is not automatically in 'custody' within the meaning of *Miranda*."); People v. Denison, 918 P.2d 1114, 1117 (Colo. 1996) (en banc) ("Nothing in *Mathis*, however, suggests that an inmate is automatically 'in custody' . . . ."); People v. Patterson, 588 N.E.2d 1175, 1179 (Ill. 1992) ("Federal courts interpreting *Mathis* have rejected the proposition that any interrogation during prison confinement constitutes custodial interrogation for *Miranda* purposes . . . . Federal courts have found that incarceration is not in itself custody."); State v. Schultz, No. 46043, 1983 WL 4749, at *1 (Ohio Ct. App. Sept. 22, 1983) ("*Mathis* cannot be mechanically applied in the prison setting, where prison guards have a duty to maintain safety and order."); Bradley v. State, 449 S.E.2d 492, 493 (S.C. 1994) ("While *Miranda* may apply to one who is in custody on an unrelated offense . . . the mere fact that one is incarcerated does not render an interrogation custodial.") (citations to *Mathis* and *Cervantes* omitted); Beamon v. Commonwealth, 284 S.E.2d 591, 593 (Va. 1981) ("*Mathis* did not establish a per se rule eliminating investigative on-the-scene questioning merely by virtue of the interviewee's prisoner status."); *see also* State v. Fuller, 281 N.W.2d 749, 752 (Neb. 1979) (Clinton, J., dissenting) (describing a broad reading of *Mathis* as "unsound").

Some authorities, however, have suggested that *Mathis* must be given a broad reading so that it prohibits any unwarned questioning of inmates. *See Fuller*, 281 N.W.2d at 749 (reading *Mathis* broadly to find that interrogation of an inmate is per se custodial interrogation and always requires *Miranda* warnings before questioning of the inmate begins); *cf.* Whitfield v. State, 411 A.2d 415, 424 (Md. 1980) (finding it unnecessary to follow the line of cases that read *Mathis* broadly to find that incarceration equals custody; in this case the defendant was deprived of his freedom of action within the *Miranda* sense when he was taken to an isolation wing and confronted as the prime suspect).

[173] *See Mathis*, 391 U.S. at 4.

[174] State v. Bradley, 461 N.W.2d 524, 540 (Neb. 1990) (quoting Leviston v. Black, 843 F.2d 302, 304 (8th Cir. 1988)); *accord Denison*, 918 P.2d at 1117; State v. Owen, 510 N.W.2d 503, 522–23 (Neb. Ct. App. 1993). The view that not all incarceration constitutes custody had been expressly presented by the dissenters (Justices White, Harlan, and Stewart) in *Mathis*:

> Although petitioner was confined, he was at the time of interrogation in familiar surroundings. Neither the record nor the Court suggests reasons why petitioner was "coerced" into answering [the agents'] questions any more than is the citizen interviewed at home by a revenue agent or interviewed in a Revenue Service office to which citizens are requested to come for interviews. The rationale of *Miranda* has no relevance to inquiries conducted outside the allegedly hostile and forbidding atmosphere surrounding police station interrogation of a criminal suspect.

Marshall, in a 1990 dissent from a denial of certiorari, urged the Court to consider the important matter of whether incarceration always constitutes custody for *Miranda* purposes.[175] Nevertheless, the Court has repeatedly declined to review cases posing the issue.[176]

However, a substantial number of both state and lower federal courts have expressly concluded that incarceration does not per se constitute *Miranda* custody.[177] Eight of the twelve Circuit Courts have ruled that incarceration does not always constitute custody for *Miranda* purposes.[178] At least seventeen

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Mathis, 391 U.S. at 7–8 (White, J., dissenting).

[175] *See* Bradley v. Ohio, 497 U.S. 1011, 1011 (1990) (Marshall, J., dissenting). In *Bradley*, an inmate was questioned without *Miranda* warnings, by prison officials, about the murder of a prison official immediately after that murder. *See id.* at 1012. The state court found that the inmate was not in custody for *Miranda* purposes because the restrictions placed on the inmate during questioning were the same restrictions imposed after any incident within the prison. *See id.* at 1014. The state court found that there was no "added imposition on [the defendant's] freedom of movement such as to make a reasonable person believe there had been a restriction of his freedom over and above that in his normal prisoner setting." State v. Bradley, No. 1583, 1987 WL 17303, at *9 (Ohio Ct. App. Sept. 22, 1987), *aff'd on other grounds*, State v. Bradley, 538 N.E.2d 373 (Ohio 1989).

Justice Marshall urged the Court to grant the petition because the Courts of Appeals had adopted differing approaches on what constitutes custody in a prison setting. *See* Bradley v. Ohio, 497 U.S. at 1012. He noted that some courts, like the state court in *Bradley*, were applying an "additional restriction" test instead of simply a restriction on the freedom of movement test. He concluded that this case would provide "the Court a chance to clarify what constitutes 'custody' for *Miranda* purposes in the prison setting." *Id.* at 1014–15.

[176] *See, e.g.*, Garcia v. Singletary, 13 F.3d 1487, 1489–91 (11th Cir.), *cert. denied*, 513 U.S. 908 (1994); United States v. Conley, 779 F.2d 970, 972–73 (4th Cir. 1985), *cert. denied*, 479 U.S. 830 (1986); Flittie v. Solem, 775 F.2d 933, 944 (8th Cir. 1985), *cert. denied*, 475 U.S. 1025 (1986); People v. Patterson, 588 N.E.2d 1175, 1179 (Ill.), *cert. denied*, 506 U.S. 838 (1992).

[177] "There is a wealth of authority to support the conclusion that a sentenced prisoner serving time in a correctional facility is not *ipso facto* in *Miranda* custody." Kochutin v. State, 813 P.2d 298, 309 (Alaska Ct. App. 1991) (Bryner, C.J., dissenting), *vacated*, 875 P.2d 778 (Alaska Ct. App. 1994) (citations omitted); *see also Denison*, 918 P.2d at 1116 ("A majority of jurisdictions ruling on the issue have adopted the *Cervantes* reasoning . . . ."); People v. Crawford, 578 N.Y.S.2d 814, 818 (Sup. Ct. 1991) ("Many lower courts have refused to find that every question directed to a prison inmate in connection with criminal activity be preceded by *Miranda* warnings merely because a prisoner is always in custody."), *aff'd on other grounds*, 647 N.Y.S.2d 727 (App. Div. 1996), *appeal denied*, 678 N.E.2d 505 (N.Y. 1997); *Schultz*, 1983 WL 4749, at *1 ("[M]any courts take the view that no per se rule exists to require *Miranda* warnings in prison.").

[178] *See infra* note 183. In addition, the United States Court of Appeals for the Third Circuit has hinted that it too might follow this line of cases. *See* Alston v. Redman, 34 F.3d 1237, 1245 n.6 (3d Cir. 1994) (concluding that it did not need to decide the issue, but

state courts have also concluded that incarceration does not always constitute custody for *Miranda* purposes.[179] While some of these cases involve on-the-scene questioning[180] about prison disturbances,[181] most involve a visit to the prison by an outside official investigating a crime unrelated to the one for which the inmate is incarcerated.[182]

Not only are there a large number of courts concluding that incarceration does not always constitute custody, but many of these courts have been quite

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referring to *Cervantes v. Walker*, 589 F.2d 424, 428–29 (9th Cir. 1988), and *Leviston v. Black*, 843 F.2d 302, 304 (8th Cir. 1988)); *see also* United States v. Vasquez, 889 F. Supp. 171, 175 (M.D. Pa. 1995) (concluding that incarceration is not necessarily custody for *Miranda* purposes).

179 *See infra* note 183.

180 *See, e.g.*, *Denison*, 918 P.2d at 1115.

> We hold that the mere fact that the accused already is in institutional custody pending disposition of his case or serving his sentence at the time of the initial, on-the-scene questioning does not of itself require the officers to refrain from all inquiry until those persons present at the scene have received proper *Miranda* warnings.

State v. Overby, 290 S.E.2d 464, 465 (Ga. 1982).

181 On-the-scene questioning, by definition, concerns a crime or disturbance occurring inside the prison. Other questioning is often about a crime occurring outside the prison but can also be about a prison crime that occurred well before the questioning about it. *See, e.g.*, *Patterson*, 588 N.E.2d at 1176–77 (defendant was serving a life sentence for an unrelated matter when he was convicted of possessing a weapon in prison; he gave a statement to a prison official investigating his possession of the knife; before giving the statement he had already been in segregation for two months for possessing the knife); State v. Deases, 518 N.W.2d 784, 788–89 (Iowa 1994) (defendant questioned about an earlier fight in prison, not on-the-scene questioning, and police detectives were already there to question him); Blain v. Commonwealth, 371 S.E.2d 838, 839 (Va. Ct. App. 1988) (defendant made a statement when his cell was searched because he was a suspect in a prison murder committed days earlier; court rejected his argument that an inmate is automatically in custody for *Miranda* purposes).

182 In some cases, the courts have found that no warnings were required both because the questioning constituted permissible on-the-scene questioning about a prison incident rather than interrogation and because the inmate, although questioned within the prison walls, was not in custody for purposes of *Miranda*. *See, e.g.*, United States v. Scalf, 725 F.2d 1272, 1276 (10th Cir. 1984) (holding that conversation was an on-the-scene inquiry and not an interrogation). Some courts, in an attempt to limit this trend of cases, have incorrectly characterized it as limited to cases involving only on-the-scene questioning in prison. *See, e.g.*, Bradley v. State, 559 A.2d 1234, 1244 n.3 (Del. 1989) (citing *Cervantes v. Walker*, 589 F.2d 424 (9th Cir. 1988) and *United States v. Conley*, 779 F.2d 970 (4th Cir. 1985), but concluding that they permit unwarned questioning of an inmate only during on-the-scene questioning).

emphatic in so finding. In many instances, the court could have avoided the whole issue of whether the questioned inmate was in custody by, for example, finding that the *Miranda* warnings were not required because the particular questioning did not constitute interrogation, or because some exigency (such as a prison disturbance) excused the absence of the warning before interrogation.[183] Instead, courts have insisted that *Miranda* concerns were not

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[183] While five of the appeals courts reached their conclusion—that the particular inmate was not in custody when questioned—in the context of cases where an inmate was directly questioned by a law enforcement official investigating a crime, *see* United States v. Menzer, 29 F.3d 1223, 1232 (7th Cir. 1994); United States v. Turner, 28 F.3d 981, 983–84 (9th Cir. 1994); United States v. Cofield, No. 91-5957, 1992 WL 78105, at *3 (6th Cir. Apr. 17, 1992); Leviston v. Black, 843 F.2d at 303; United States v. Cooper, 800 F.2d 412, 413–15 (4th Cir. 1986), two courts did so in the context of on-the-scene questioning of an inmate by prison officials about a prison matter, *see* Garcia v. Singletary, 13 F.3d 1487, 1489–92 (11th Cir. 1994); *Scalf*, 725 F.2d at 1274–75. These courts went out of their way to find that the inmate was not in custody rather than to reach the same result, that the unwarned questions were permitted, by concluding that the on-the-scene questions were not interrogation for *Miranda* purposes.

The United States Court of Appeals for the Second Circuit held that incarceration is not always *Miranda* custody in the context of a case involving questioning by an undercover agent about a new crime. *See* United States v. Willoughby, 860 F.2d 15, 23–24 (2d Cir. 1988). This court, too, could have admitted the disputed statement without reaching the incarceration-as-custody issue. The court could have ruled, as the Supreme Court did two years later in *Illinois v. Perkins*, 496 U.S. 292 (1990), that the questioning was not interrogation for *Miranda* purposes because it was done by an undercover agent who exerted no coercive force on the defendant. *See id.* at 294. The Supreme Court avoided the custody issue by concluding that undercover questioning was not interrogation and, thus, did not implicate the *Miranda* concerns that arise with the simultaneous existence of interrogation and custody. *See id.* at 297.

While ten state courts reached their conclusion that the particular inmate was not in custody in the context of direct questioning of inmates by law enforcement officials investigating new crimes, *see* People v. Anthony, 230 Cal. Rptr. 268, 273 (1986); *Patterson*, 588 N.E.2d at 1177; *Deases*, 518 N.W.2d at 788–89; Bradley v. State, 473 N.W.2d 224, 225–29 (Iowa Ct. App. 1991); State v. Benoit, 898 P.2d 653, 662 (Kan. Ct. App. 1995); State v. Owen, 510 N.W.2d 503, 522–23 (Neb. Ct. App. 1993); Bradley v. State, 449 S.E.2d 492, 492 (S.C. 1994); *Blain*, 371 S.E.2d at 840–41; State v. Post, 826 P.2d 172, 178–79 (Wash.), *amended by* 837 P.2d 599 (Wash. 1992); *see also* State v. Ledbetter, 676 A.2d 409, 412–15 (Conn. App. Ct. 1996) (unwarned questioning at presentence interview), *aff'd on other grounds*, 692 A.2d 713 (Conn. 1997), four other state courts went out of their way to find that the questioned inmate was not in custody, *see* Arthur v. State, 575 So. 2d 1165 (Ala. Ct. App. 1990); Carr v. State, 840 P.2d 1000 (Alaska Ct. App. 1992); State v. Fulminante, 778 P.2d 602 (Ariz. 1988), *aff'd on other grounds*, 499 U.S. 279 (1991); Whitfield v. State, 411 A.2d 415 (Md. 1980). Two of these latter four courts could have admitted the disputed statements by concluding that undercover questioning is not interrogation, but admitted the

implicated because, even if the questioning constituted interrogation, the inmate questioned was not in custody despite his presence within prison walls. Courts have looked beyond the traditional definition of custody to devise a test, the "additional restraint test," which reflects the concerns of *Miranda*, but is better suited to the unique circumstances of a prison setting.[184]

C. *Defining Custody for Inmates: The Additional Restraint Test*

1. *Rationale for the Additional Restraint Test*

The traditional test for determining if a person was in custody when questioned focuses on whether there was a restraint on the defendant's freedom of movement of the degree associated with formal arrest and that would have made a reasonable person feel he was not free to leave. Accordingly, courts consider factors such as the location, length, mood, and mode of interrogation;[185] the number of officers present;[186] any restraint placed on the defendant;[187] the intentions of the officers;[188] and whether the defendant was

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unwarned questioning without warnings by finding that the inmate was not in *Miranda* custody. *See Carr*, 840 P.2d at 1003–05; *Fulminante*, 778 P.2d at 605–08. Three other state courts declined to find an absence of interrogation and, instead, found an absence of custody when inmates were subjected to on-the-scene questioning about a prison incident. *See Denison*, 918 P.2d at 1117; State v. Schultz, No. 46043, 1983 WL 4749, at *2 (Ohio Ct. App. Sept. 22, 1983); *Overby*, 290 S.E.2d at 466.

[184] Courts have been particularly likely to permit questioning without warnings in the context of on-the-scene questioning about a prison disturbance. A finding that inmates are always in *Miranda* custody and thus always subject to questioning in prison only after warnings "could totally disrupt prison administration." *Benoit*, 898 P.2d at 662 (quoting Cervantes v. Walker, 589 F.2d 424, 427 (9th Cir. 1978)).

[185] *See, e.g.*, Berkemer v. McCarty, 468 U.S. 420, 437–38 (1984) (roadside questioning is not custodial because it is "presumptively temporary and brief" and takes place in public); Minnesota v. Murphy, 465 U.S. 420, 433 (1984) (defendant not in custody when questioned by probation officer during an "appointment at a mutually convenient time"); Beckwith v. United States, 425 U.S. 341, 343–44, 347 (1976) (defendant not in custody when questioned by Internal Revenue Service agents at his home).

[186] *See, e.g.*, Orozco v. Texas, 394 U.S. 324, 324–25 (1969) (defendant confronted in his bedroom by four police officers was in custody); Sprosty v. Buchler, 79 F.3d 635, 641 (7th Cir.) (finding of custody less likely if confronted only by one or two officers), *cert. denied*, 117 S. Ct. 150 (1996).

[187] *See, e.g.*, New York v. Quarles, 467 U.S. 649, 655 (1984) (defendant questioned in a supermarket at gunpoint was in custody); United States v. Johnson, 64 F.3d 1120, 1126 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 971 (1996); United States v. Smith, 3 F.3d 1088, 1097–98 (7th Cir. 1993) (defendant in handcuffs was in custody).

[188] *See, e.g.*, Oregon v. Mathiason, 429 U.S. 492, 495 (1977) (per curiam) (defendant

the focus of the investigation.[189]

This freedom to move or leave test is not particularly useful in considering the questioning of prison inmates,[190] none of whom are free to leave the facility entirely if they do not wish to answer any questions.[191] Blind application of the traditional test for custody would suggest that all prison inmates are always in custody for *Miranda* purposes.[192]

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not in custody when police told him he was not under arrest but was a suspect).

[189] *See, e.g.*, United States v. Fazio, 914 F.2d 950, 956 (7th Cir. 1990) (defendant repeatedly told he was not under arrest).

[190] *See* People v. Anthony, 230 Cal. Rptr. 268, 272 (Ct. App. 1986) (the interrogation of inmates is not easily evaluated under the "traditional formulations of the *Miranda* rule") (quoting United States v. Conley, 779 F.2d 970, 973 (4th Cir. 1985)); *cf.* Florida v. Bostick, 501 U.S. 429, 435–40 (1991) (free to leave test is not useful for determining whether a bus passenger can leave; instead the Court asked if the passenger felt free to decline to speak with the officers).

[191] *See* United States v. Cofield, No. 91-5957, 1992 WL 78105, at *2 (6th Cir. Apr. 17, 1992) ("No reasonable prisoner ever feels completely free to leave, as prisoners are placed in prison for the very purpose of preventing them from leaving."); Bradley v. State, 473 N.W.2d 224, 228 (Iowa Ct. App. 1991) ("[I]n a prison setting the entire group is under restraint of free movement."); People v. Margolies, 480 N.Y.S.2d 842, 848 (Sup. Ct. 1984) ("An individual in prison is, of course, in custody in the broader sense. His movements are inflexibly regulated by the institution and he is rarely free to move outside of the confines of the prison or without escort."); People v. Smith, 459 N.Y.S.2d 528, 534 (Sup. Ct. 1983) ("In a prison setting, however, the 'free-to-leave' test must be modified because prisoners are never free to leave. A pure custody test would mean that no prisoner could ever be questioned without *Miranda* compliance—a wholly unworkable and disruptive approach.") (citation omitted).

[192] As the *Anthony* court noted:

> A rational inmate will always accurately perceive that his ultimate freedom of movement is absolutely restrained and that he is never at liberty to leave an interview conducted by prison or other government officials. Evaluation of prisoner interrogations in traditional freedom-to-depart terms would be tantamount to a *per se* finding of "custody," a result we refuse to read into the *Mathis* decision.
>
> A different approach to the custody determination is warranted in the paradigmatic custodial prison setting where, by definition, the entire population is under restraint of free movement.

230 Cal. Rptr. at 272 (quoting *Conley*, 779 F.2d at 973).

Some judges have gone so far as to conclude that "the considerations in *Miranda* have no relevance to a person whose 'custody' consists of being a tenant in a state prison as a result of a conviction of an unrelated crime." State v. Fuller, 281 N.W.2d 749, 750 (Neb. 1979) (Clinton, J., dissenting); *accord* People v. Patterson, 588 N.E.2d 1175, 1179 (Ill. 1992) ("Since a prisoner is never free to leave, to apply *Miranda* standards would be tantamount to

Courts have rightfully concluded that while the *Miranda* considerations are quite relevant within prison walls, the definition of custody must take into account the highly regulated life of inmates.[193] Because the free to leave standard would place all inmates in custody at every moment of their incarceration, courts have required something more than just deprivation of the ability to leave the facility.[194] Finding that the goals of *Miranda* do not require

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a *per se* finding of custody for prison inmates."); *Smith*, 459 N.Y.S.2d at 532 ("If confinement alone were the test, no prisoner, because of his status as an incarcerated felon, could ever be lawfully questioned without *Miranda* warnings.").

> The traditional "custody" analysis of *Miranda* is not appropriate when the interview or questioning may have occurred in a prison setting or the person being questioned is serving a criminal sentence. All convicted felons serving their sentence are in "custody" because their freedom of movement is 'restricted' until they have served their sentence.

State v. Post, 826 P.2d 172, 178 (Wash.), *amended by* 837 P.2d 599 (Wash. 1992).

[193] Several courts have noted that application of the traditional test for custody to inmates would arguably give the inmates greater rights than those possessed by all other citizens. *See, e.g.*, Beamon v. Commonwealth, 284 S.E.2d 591, 592 (Va. 1981) ("Prisoners do not have greater Fifth Amendment rights than other persons."). A person who is not an inmate and is not otherwise in custody can be questioned by the police or other officials in a wide range of situations without the administration of *Miranda* warnings. *See, e.g.*, Mathis v. United States, 391 U.S. 1, 3–4 (1967) (holding that *Miranda* warnings must be given before interrogation while in custody); *see also* Grano, *supra* note 83, at 269 (observing that *Miranda* will not apply when the subject is not in custody). If inmates are deemed always to be in custody, however, then officials can never question any inmate about any matter without first giving the *Miranda* warnings. *Cf.* Kochutin v. State, 813 P.2d 298, 309 n.4 (Alaska Ct. App. 1991) (Bryner, C.J., dissenting), *vacated*, 875 P.2d 778 (Alaska Ct. App. 1994).

In *Post*, 826 P.2d at 178, the court found that "traditional *Miranda* 'custody' analysis leads to the anomalous result of requiring *Miranda* warnings anytime a prison official desires to speak with an inmate." This is somewhat of an overstatement because, even when a person is in custody, he must be given his warnings only if he is interrogated. *See* Rhode Island v. Innis, 446 U.S. 291, 300 (1979); *see also supra* Part II.B–C. On the other hand, interrogation has been defined broadly so that it includes not only explicit questioning but mere comments or even wordless actions that officials know might prompt a person to speak. *See Innis*, 446 U.S. at 301 ("any words or actions on the part of the police . . . likely to elicit an incriminating response").

[194] *See, e.g.*, United States v. Aburahmah, No. 93-10539, 1994 WL 461635, at *2 (9th Cir. Aug. 25, 1994) ("The 'free to leave' standard . . . does not apply to prisoners, for if it did, all prison questioning would be considered custodial."). "Applying the 'free to leave' standard in a prison setting would create the illogical result of entitling a prisoner to *Miranda* warnings merely because of his status as a prisoner. Thus, a prisoner would have greater *Miranda* protection than a nonprisoner." *Cofield*, 1992 WL 78105, at *2; *accord* United States v. Menzer, 29 F.3d 1223, 1231–32 (7th Cir. 1994); *Conley*, 779 F.2d at 973;

that every inmate be deemed in custody during every moment of incarceration,[195] many courts have rejected application of the free to leave test in prison settings and have adopted a "restriction of movement" or "additional restraint" test for evaluating whether inmates are in custody.[196] Rather than asking whether the prisoner was free to leave the entire facility and go home, courts make the more relevant inquiry into whether the inmate was subjected to some restraint additional to those usually imposed on him as an inmate.[197] The additional restraint test gives great weight to the notion that custody generally involves removal from one's familiar surroundings.[198] An additional restraint is one that places a "restriction on his freedom of action in connection with the interrogation"[199] and prevents him from leaving the scene of the questioning[200]

Cervantes v. Walker, 589 F.2d 424, 428 (9th Cir. 1978); *Patterson*, 588 N.E.2d at 1179.

[195] *See* State v. Deases, 518 N.W.2d 784, 789 (Iowa 1994); *Post*, 826 P.2d at 178. "[N]othing in *Miranda* suggests than an inmate is automatically 'in custody' and therefore entitled to *Miranda* warnings merely by virtue of his prisoner status." *Anthony*, 230 Cal. Rptr. at 272.

[196] *See Cofield*, 1992 WL 78105, at *2; *see also* Cure v. State, 600 So. 2d 415, 419 (Ala. Ct. Crim. App. 1992); People v. Johnson, 555 N.E.2d 412, 413 (Ill. Ct. App. 1990) ("We do not believe, however, a suspect is automatically entitled to *Miranda* warnings by virtue of his inmate status. To the contrary, custody in the prison setting 'necessarily implies a change in the surroundings of the [inmate] which results in an added imposition on his freedom of movement.'") (citations omitted).

[197] *See, e.g.*, State v. Warner, 889 P.2d 479, 483 (Wash. 1995) ("When dealing with a person already incarcerated, 'custodial' means more than just the normal restrictions on freedom incident to incarceration.").

[198] *See* State v. Benoit, 898 P.2d 653, 662–63 (Kan. Ct. App. 1995) (holding that inmate was in custody when he was "removed from the familiar surroundings of" the facility in which he was serving his sentence to a different facility for questioning); *cf.* People v. Denison, 918 P.2d 1114, 1117 (Colo. 1996) (holding that the defendant was not in custody where he was questioned in the jail cell in which he "had been housed for some time"); State v. Peeples, 640 N.E.2d 208, 213 (Ohio Ct. App. 1994) ("change in surroundings" when taken to deputy warden's office did not result in a finding of custody), *aff'd on other grounds*, 656 N.E.2d 1285 (Ohio 1995).

[199] Leviston v. Black, 843 F.2d 302, 304 (8th Cir. 1988). There "must be some added restriction on the inmate's freedom of movement stemming from the interrogation itself." *Deases*, 518 N.W.2d at 789. "'When an individual is incarcerated for an unrelated offense, this requires some restriction on his freedom of action in connection with the interrogation itself.'" State v. Owen, 510 N.W.2d 503, 522 (Neb. Ct. App. 1993) (quoting *Leviston*, 843 F.2d at 304).

[200] *See* Garcia v. Singletary, 13 F.3d 1487, 1491–92 (11th Cir. 1994); *Leviston*, 843 F.2d at 303. "There must, therefore, be some additional circumstance, condition, or limitation imposed on an imprisoned suspect's status or mobility before *Miranda* applies." People v. Smith, 459 N.Y.S.2d 528, 534 (Sup. Ct. 1983).

by placing a further limit on his already limited freedom of movement.[201] The important question is "whether the prisoner would reasonably believe himself to be in custody beyond that imposed by the confines of ordinary prison life."[202] An inmate should be deemed to be in *Miranda* custody when he is subjected to some restraint beyond what he usually endures as an inmate in confinement.[203]

"To determine whether prison officials have applied an additional restraint, further restricting an inmate's freedom and triggering *Miranda* warnings, courts must consider the totality of the circumstances surrounding the alleged interrogation."[204] The factors for custody are considered under an objective standard with an inquiry into how a reasonable person would view the circumstances of the inmate's questioning.[205]

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[201] *See* State v. Post, 826 P.2d 172, 179 (Wash.), *amended by* 837 P.2d 599 (Wash. 1992).

[202] People v. Margolies, 480 N.Y.S.2d 842, 848 (Sup. Ct. 1984) ("This is simply another way of applying the standard custody test . . . . Would a person innocent of any crime reasonably believe he was free to leave (or in a prison situation, free to terminate the interview)?") (citation omitted); Blain v. Commonwealth, 371 S.E.2d 838, 840–41 (Va. Ct. App. 1988) (holding that the test for custody in prison requires a "'change in the surroundings of the prisoner which results in an added imposition on his freedom of movement,'" so that the inmate is "'subjected to more than the usual restraint on a prisoner's liberty to depart.'") (quoting Cervantes v. Walker, 589 F.2d 424, 428 (9th Cir. 1978), and United States v. Conley, 779 F.2d 970, 973 (4th Cir. 1985), respectively); *see also* People v. Alls, 629 N.E.2d 1018, 1021 (N.Y. 1993) (asking whether there was an "added constraint that would lead a prison inmate reasonably to believe that there has been a restriction on that person's freedom over and above that of ordinary confinement in a correctional facility").

[203] There must be a "measure of compulsion above and beyond that confinement," United States v. Willoughby, 860 F.2d 15, 24 (2d Cir. 1988), or "'a change in the surroundings of the prisoner which results in an added imposition on his freedom of movement.'" United States v. Cooper, 800 F.2d 412, 414 (4th Cir. 1986) (quoting *Conley*, 779 F.2d at 973); *see also* United States v. Menzer, 29 F.3d 1223, 1232 (7th Cir. 1994) (citing *Leviston* and *Conley*); United States v. Brown, No. 89 CR 772, 1990 WL 19975, at *3 (N.D. Ill. Feb. 27, 1990) (mem.); Cure v. State, 600 So. 2d 415, 419 (Ala. Ct. Crim. App. 1992) ("[W]e hold that 'custody' or 'restriction' in the context of prison 'necessarily implies a change in the surroundings of the prisoner which results in an added imposition on his freedom of movement,' . . . .") (quoting Cervantes v. Walker, 589 F.2d at 428).

[204] Garcia v. Singletary, 13 F.3d at 1492; *accord* Bradley v. State, 473 N.W.2d 224, 228 (Iowa Ct. App. 1991) ("[W]e must look to the totality of the circumstances surrounding the interrogation to determine whether the inmate is subject to more than the usual restraint on a prisoner's liberty to depart."); *Owen*, 510 N.W.2d at 522–23.

[205] *See* Arthur v. State, 575 So. 2d 1165, 1188 (Ala. Ct. Crim. App. 1990). In most of the cases finding that an inmate was not in custody, the interrogation concerned a matter unrelated to the crime for which the inmate was in the correctional facility. *See, e.g.*, Leviston v. Black, 843 F.2d at 304 ("[W]hile *Miranda* may apply to one who is in custody

2. *Application of the Additional Restraint Test*

The reasonable person standard used in determining custody under the freedom to leave test is also used in considering whether an inmate has been subjected to an additional restraint that creates custody within the prison context.[206] The relevant question is whether a reasonable person in the same position as the inmate would believe that he was in custody.[207] There must be objective facts indicating that the inmate's freedom of movement was restricted.[208]

In considering the totality of the circumstances,[209] many courts have looked to the four categories of factors specified in *Cervantes v. Walker*,[210] the seminal case from the United States Court of Appeals for the Ninth Circuit on the additional restraint test: (1) the physical surroundings of the interrogation; (2) the language used to summon the inmate; (3) the extent to which he is confronted with evidence of his guilt; and (4) any additional pressure exerted to detain him such that there is a "restriction of his freedom over and above that in his normal prison setting."[211]

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for an offense unrelated to the interrogation, incarceration does not ipso facto render an interrogation custodial.") (citations omitted); Flittie v. Solem, 775 F.2d 933, 944 (8th Cir. 1985) (incarcerated on another matter). While one of the first cases, *Cervantes v. Walker*, 589 F.2d at 427–28, involved questioning about a prison incident, that case has been relied on in many other cases to permit unwarned questioning about incidents and crimes outside of the prison. *See, e.g.*, United States v. Turner, 28 F.3d 981, 983–84 (9th Cir. 1994) (defendant made statements during telephone conversation while detained on unrelated charges); United States v. Cheely, 36 F.3d 1439, 1441 (9th Cir. 1994) (defendant planned mail bomb murder while incarcerated). Some courts have gone even further and found that an inmate was not in custody even though he was still awaiting trial and was questioned about the matter on which he was being held in a correctional facility pending trial. *See Willoughby*, 860 F.2d at 23–24.

[206] *See* United States v. Cofield, No. 91-5957, 1992 WL 78105, at *2–3 (6th Cir. Apr. 17, 1992); Leviston v. Black, 843 F.2d at 303. Restriction, thus, becomes a relative concept and is not determined simply by a lack of freedom to leave. There must be some further limitation placed on the inmate. "In analyzing the custodial nature of prison interviews, courts generally look to the traditional tests for determining custody." *Margolies*, 480 N.Y.S.2d at 848.

[207] *See* State v. Deases, 518 N.W.2d 784, 789 (Iowa 1994).

[208] *See* State v. Post, 826 P.2d 172, 179 (Wash.) (holding that psychological compulsion is not enough to show an additional restriction), *amended by* 837 P.2d 599 (Wash. 1992).

[209] *See* Bradley v. State, 449 S.E.2d 492, 493 (S.C. 1994) ("The totality of the circumstances, including the individual's freedom to leave the scene and the purpose, place, and length of the questioning must be considered.").

[210] 589 F.2d 424, 427–28 (9th Cir. 1978).

[211] *Id.*; *see also* Arthur v. State, 575 So. 2d 1165, 1188–89 (Ala. Ct. Crim. App. 1990) (citing *Cervantes*); *Deases*, 518 N.W.2d at 789.

In considering the physical surroundings in which an inmate was questioned, courts have paid close attention to whether an inmate was taken from his cell to another part of the facility that was relatively more or less confining than was the cell. For example, an inmate moved from his cell to an isolation wing is probably in custody.[212] On the other hand, an inmate is less likely to be deemed in custody if questioned in a visitor's room,[213] conference room,[214] assistant warden's room,[215] or interview room.[216] In fact, some courts have noted that an inmate's freedom of movement may increase when he is moved from his cramped cell to some more open part of the facility,[217] especially if the area is well lit[218] and the door is unlocked.[219]

In assessing the second factor, the language used to summon the inmate, courts often begin by considering the identity of the questioner.[220] They are less likely to find custody when the questioner is an outside visitor to the facility.[221] If the defendant initiated contact with the authorities and was not summoned for questioning, courts are particularly unlikely to find that he was in custody.[222]

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[212] *See* Whitfield v. State, 411 A.2d 415, 426 (Md. 1980); *see also* People v. Alls, 629 N.E.2d 1018, 1022 (N.Y. 1993) (finding an added restraint where inmate was taken to a place of isolation by compulsion of a law enforcement official even though the place was less coercive than a police headquarters).

[213] *See* Flittie v. Solem, 775 F.2d 933, 944 (8th Cir. 1985) (en banc).

[214] *See* United States v. Cooper, 800 F.2d 412, 414 (4th Cir. 1986).

[215] *See* United States v. Cofield, No. 91-5957, 1992 WL 78105, at *3 (6th Cir. Apr. 17, 1992).

[216] *See* United States v. Menzer, 29 F.3d 1223, 1232–33 (7th Cir. 1994); Leviston v. Black, 843 F.2d 302, 304 (8th Cir. 1988).

[217] *See, e.g.*, Garcia v. Singletary, 13 F.3d 1487, 1492 (11th Cir. 1994); *see also* People v. Patterson, 588 N.E.2d 1175, 1180 (Ill. 1992) (holding that no custody existed where inmate was in segregation before the interrogation); *cf. Whitfield*, 411 A.2d at 426 (finding that defendant taken to isolation for questioning was in custody).

[218] *See Menzer*, 29 F.3d at 1232.

[219] *See, e.g., id.*; *Cooper*, 800 F.2d at 414; *see also* Leviston v. Black, 843 F.2d at 304 (finding no custody even where door was locked).

[220] *See, e.g.*, Arthur v. State, 575 So. 2d 1165, 1189 (Ala. Ct. Crim. App. 1990) (supervisor at work release center; custody found); State v. Fulminante, 778 P.2d 602, 606–08 (Ariz. 1988) (undercover informant; no custody found), *aff'd on other grounds*, 499 U.S. 279 (1991); State v. Deases, 518 N.W.2d 784, 789–90 (Iowa 1994) (prison guard; custody found).

[221] *See, e.g.*, United States v. Cooper, 800 F.2d 412, 413–15 (4th Cir. 1986) (correctional treatment specialist; defendant not in custody); State v. Owen, 510 N.W.2d 503, 512 (Neb. Ct. App. 1993) (defendant was not in custody when questioned by an FBI investigator while in state prison).

[222] *See, e.g.*, People v. Anthony, 230 Cal. Rptr. 268, 269 (1986) (determining "whether defendant, incarcerated in jail, who initiates telephone conversations with the police at

Most courts have found that an inmate who makes an incriminating statement while on the telephone, whether to an announced government official or to an undercover agent or informant, is not in custody and does not have to be warned before the telephone conversation.[223] Even if the defendant did not initiate contact, courts are less likely to find custody if the inmate was expressly told that he was free to return to his cell or to otherwise leave the area where he was being questioned.[224]

In assessing the third factor, courts look at both the extent to which the inmate was confronted with evidence of guilt[225] and the general tenor of the questioning. An inmate immediately confronted with compelling evidence of guilt in order to shock information out of him is almost surely in custody.[226] In fact, an inmate is likely to be deemed in custody if he is clearly the only suspect[227] and the questioning is clearly intended to determine his culpability

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another facility, is 'in custody' such that *Miranda* warnings are required. We hold that he is not."); State v. Bradley, 461 N.W.2d 524, 540–41 (Neb. 1990) (holding that inmate speaking on phone to informant was not in custody); Bradley v. State, 449 S.E.2d 492, 494 (S.C. 1994) (holding that defendant initiated contact by calling officer and had no obligation to remain on the phone).

[223] *See, e.g.*, Cure v. State, 600 So. 2d 415, 418–19 (Ala. Ct. Crim. App. 1992) (observing that while in jail awaiting trial, defendant made an incriminating statement on the phone to a friend, who allowed the police to listen, and concluding that defendant was not in *Miranda* custody during the call because she could have hung up at any time).

[224] Courts have found no custody when the inmate was told that the interview was voluntary and that the inmate could end it at any time, *see* United States v. Cofield, No. 91-5957, 1992 WL 78105, at *1 (6th Cir. Apr. 17, 1992), when the inmate was told she was under no compulsion to speak and was free to leave the interview room, *see Owen*, 510 N.W.2d at 522–23, and when the inmate was told he could leave the place of questioning, *see* People v. Alls, 629 N.E.2d 1018, 1021–23 (N.Y. 1993); *cf.* Leviston v. Black, 843 F.2d 302, 309 n.3 (8th Cir. 1988) (observing that the defendant may not be in custody even if not told he could leave); People v. Patterson, 588 N.E.2d 1175, 1180 (Ill. 1992) (holding the defendant not in custody; he could have asked to leave the office where he was questioned). *But see Deases*, 518 N.W.2d at 789 (holding that the defendant was in custody; three times he said he did not want to talk).

[225] *See Arthur*, 575 So. 2d at 1171 (describing interview); *id.* at 1188 (finding defendant not in custody).

[226] *See, e.g.*, Whitfield v. State, 411 A.2d 415, 426 (Md. 1980); *cf.* People v. Denison, 918 P.2d 1114, 1117 (Colo. 1996) (inmate was asked open-ended questions).

[227] *See, e.g.*, State v. Fulminante, 778 P.2d 602, 605–07 (Ariz. 1988) (defendant was the prime suspect; but custody not found based on other reasons), *aff'd on other grounds*, 49[illegible] U.S. 279 (1991); *Whitfield*, 411 A.2d at 426 (defendant was the only inmate questioned abou the crime of having a gun in the prison); *cf. Owen*, 510 N.W.2d at 523 (defendant was not i custody when she was approached as a possible victim).

and not as part of a general investigation.[228] On the other hand, a relaxed discussion about an ongoing investigation[229] may well be deemed to be non-custodial.[230]

The fourth, and perhaps most important, factor is whether any additional restraints were placed on the inmate. These could include being questioned in an isolated part of the facility or in a locked room or being handcuffed while questioned.[231] Inmates questioned without any physical restraints, while they are in a recreational or visiting area, and after an explicit comment that they are free to decline to speak, have generally been deemed not to be in *Miranda* custody.[232]

D. *Using the Additional Restraint Test to Limit the Question-Proof Status of Inmates*

It is hardly surprising that the trend is clearly towards finding that not every minute of incarceration also constitutes custody for *Miranda* purposes. The cases make sense in the context of the Court's broader statements about the meaning of custody.[233] "*Miranda*'s requirement of warnings and its establishment of a right to counsel as an adjunct to the fifth amendment's guarantee against compulsory self-incrimination were predicated on the inherently coercive nature of confinement in police custody following an arrest."[234] There is little in the Court's cases to suggest that the great potential

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[228] *See, e.g.*, *Deases*, 518 N.W.2d at 789.

[229] *See, e.g.*, *Cofield*, 1992 WL 78105, at *3.

[230] *See, e.g.*, Leviston v. Black, 843 F.2d 302, 304 (8th Cir. 1988) (finding that questioning lasted only a half hour).

[231] *See* United States v. Vasquez, 889 F. Supp. 171, 175 (M.D. Pa. 1995) (holding that inmate was in custody because handcuffing was a further restriction than was customary in prison). *But see* United States v. Cooper, 800 F.2d 412, 414 (4th Cir. 1986) (no custody where inmate was not handcuffed); People v. Patterson, 588 N.E.2d 1175, 1180 (Ill. 1992) (holding that defendant was not in custody because he could have asked to have handcuffs removed); *Deases*, 518 N.W.2d at 789 (holding that defendant was in custody when he was taken in restraints to a health unit after a fight).

[232] *See* Leviston v. Black, 843 F.2d at 303–04; *see also* Flittie v. Solem, 775 F.2d 933, 944–45 (8th Cir. 1985) (en banc).

[233] The "additional restraint" test for determining whether an inmate is in *Miranda* custody is consistent with the Supreme Court's finding that a bus passenger is not in custody simply because his freedom of movement is restricted. The Court found that "[i]n such a situation, the appropriate inquiry is whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." Florida v. Bostick, 501 U.S. 429, 436 (1991).

[234] Kochutin v. State, 813 P.2d 298, 309 (Alaska Ct. App. 1991) (Bryner, C.J.,

for coercion existing shortly after arrest, or arguably at any time pre-trial, also continues to exist for every moment of all the subsequent years of the defendant's incarceration. Even in the early pre-trial, post-arrest stages, the inherently compelling nature of custody is a fiction in many cases.[235] There is no good basis for extending this fiction to insulate some suspects from questioning for years or even their entire life based on a single request, long ago, for counsel.

The cases finding that an inmate is not necessarily in *Miranda* custody even at the moment when he is interrogated in prison demonstrate that an inmate is surely not in *Miranda* custody during the long period of incarceration, before any interrogation, when he is merely a prisoner serving his sentence. As one judge aptly noted,

> When a person is confined in custody solely as a sentenced prisoner, with no charges pending, the issue of guilt resolved by a final verdict, and the terms and conditions of future confinement clearly defined in a written judgment that is a matter of public record, the anxiety and uncertainty that support *Miranda*'s finding of inherent coercion simply cease to exist. When custody is not related to any pending or unresolved matter. . . there is little cause for concern that a police officer will "appear to control the suspect's fate," at least in the absence of a showing that the officer's conduct somehow creates an atmosphere of custody going beyond that to which the suspect is accustomed in his normal setting.[236]

There is no question that *Miranda* custody and, thus, any existing question-proof status, ends when an inmate leaves the prison facility on bail or at the completion of his sentence. Release into the general prison population as a sentenced prisoner can have the same effect, ending both *Miranda* custody and the question-proof status conferred by an earlier invocation of the right to counsel.

While release into the general prison population as a sentenced prisoner is obviously quite different than release to one's home, it is still a significant event for *Miranda* purposes. Release into the general prison population places an inmate in a very different atmosphere than the one he endured after arrest as a pre-trial detainee, worried and uncertain about his fate with regard to the pending charges.

A sentenced prisoner, settled into the routine of his new life in the general prison population, is incarcerated but may well be out of *Miranda* custody. Of

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dissenting), *vacated*, 875 P.2d 778 (Alaska Ct. App. 1994).

[235] Even in the absence of *Miranda* warnings, suspects may make statements for a range of reasons unrelated to police coercion.

[236] *Kochutin*, 813 P.2d at 309 (Bryner, C.J., dissenting).

course, he may and probably should be deemed to have returned to a custodial state once he is approached for questioning. But the extended period of time during which the inmate was incarcerated but was not in *Miranda* custody is a break in custody that has the effect, like any other break in custody, of allowing his question-proof status to end. Once the bar against approaching him ends, the incarcerated suspect, like a suspect who is out on bail, can be taken back into custody, informed of his *Miranda* rights again, and questioned about a different crime.

When a defendant leaves the station house, such as on bail, and resumes the normal routines of life, the Court has recognized that he no longer requires the protection of the *Edwards* prophylactic rule.[237] Such a defendant is entitled to the usual *Miranda* protections, but not the additional prophylactic protection of being rendered question-proof. Likewise, the inmate who has assumed his new routine in prison no longer needs the extra protection of *Edwards*. The restraints necessarily imposed by incarceration become familiar matters to inmates and do not create the coercive circumstances in which it must be presumed that one's free will is overborne.

The cases finding that an inmate is not always in custody are actually more sensibly applied with regard to the allegedly question-proof inmate than in the context in which they were decided. Courts have relied on the view that continuous incarceration is not always continuous *Miranda* custody only to excuse the absence of any warnings before the interrogation of an inmate who was permissibly approached since he never invoked his right to counsel.[238] Thus, lower courts have found that those suspects who long ago invoked their right to counsel cannot even be approached, much less questioned, but that those suspects who did not invoke, in the past, can be approached and can be questioned without even being warned. The result is some inmates cannot be approached at all, while the many who can be approached often get no warnings. The seeming disparity in rights between those who did or did not long ago invoke the right to counsel is surely not warranted given that both groups of inmates will live in the same circumstances as sentenced prisoners.

In fact, just the opposite result would be preferable to the one seemingly dictated by the existing lower court decisions: expand the opportunities to approach inmates, including those inmates who once invoked their right to counsel, but make sure that all inmates subjected to custodial interrogation are adequately informed of their rights. Instead of using the view that incarceration is not custody as a basis for excusing the absence of warnings, use it as a basis

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[237] *See supra* note 10.

[238] *See, e.g.*, United States v. Willoughby, 860 F.2d 15, 23 (2d Cir. 1988) ("[W]e believe that the mere fact of imprisonment does not mean that all of a prisoner's conversations are official interrogations that must be preceded by *Miranda* warnings.").

to find a break in custody so that a suspect can be approached; but then be liberal in finding a resumption of the custodial state once the inmate is approached so that he will be entitled to the *Miranda* warnings, or even more substantial protections, before he is questioned.

By recognizing that incarceration is not per se custody but that incarceration plus some additional restraint within prison can quickly create custody, courts would strike a reasonable balance between individual rights and law enforcement needs. Officials would have the opportunity to approach incarcerated suspects well before they had served their entire sentence. But incarcerated suspects would be appropriately protected because additional restrictions would be liberally found so that most incarcerated suspects, after being approached, could be questioned within prison only if they were first given their *Miranda* warnings or some other protective measure, such as a waiver colloquy before a judge.[239]

Limiting the duration of the bar on approaching incarcerated suspects will serve society's interest in effective law enforcement. The reduced protection of individual rights is warranted because the duration of the bar now is so unnecessarily long for incarcerated suspects that, even when limited as suggested here, individual rights will still be adequately protected. Individual rights will be protected differently, but more appropriately, if courts permit more incarcerated suspects to be approached but more strictly require protective measures to be taken before an inmate is actually questioned. For example, after approaching the incarcerated suspect, officials could provide not just the *Miranda* warnings, but some additional, more substantial procedures to truly insure a knowing and voluntary waiver. These could include: more extensive warnings by the officers, written waivers, videotaped waivers, or a waiver before a judge or magistrate.

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[239] Although the coercive pressures during incarceration are not so great as to always constitute custody, a suspect's status as an inmate may warrant some warnings even more protective than those provided by *Miranda* before the suspect is questioned within the prison. For example, if the incarcerated suspect once invoked the right to counsel, officers could take the suspect before a judicial officer for a waiver colloquy even if the question-proof status has ended, leaving the suspect available for questioning after only *Miranda* warnings are given.

Relying on a waiver colloquy before a judge would best insure the voluntariness of any waiver obtained from an incarcerated inmate who was approached in prison for questioning after he had earlier invoked his right to counsel. As a neutral arbiter, the judge can describe the suspect's rights with a sincerity that may be lacking when even a well-intentioned officer, who is eager to obtain a statement, must explain to a suspect that he need not speak at all. Moreover, because the government in general, even if not the particular questioning official, controls so much of an inmate's life, the presence of a judge at any waiver will better insure that the inmate truly understands that he is under no obligation to speak with the official in order to preserve the existing order of his life as a sentenced inmate.

Individual rights would be properly protected and law enforcement needs recognized if courts relied on the "incarceration does not equal custody" rule to find that an inmate's question-proof status can end in prison, if the courts also interpret the additional restraint test to insure that inmates are given their *Miranda* warnings before actually being questioned. For example, the use of measures such as handcuffing the inmate, surrounding him with officers, or moving him to an isolated room or area within the prison, generally should constitute an additional restraint that would shift the inmate from a non-custodial to a custodial state. If courts give a liberal reading to what constitutes an additional restraint beyond general incarceration, the result would be that: (1) the bar on approaching a suspect after he invokes his Fifth Amendment right to counsel would end, and the inmate could be reapproached because there would be a break in custody when he entered routine prison life, but (2) when that inmate was reapproached and questioned while in prison, he would still be given his *Miranda* warnings or additional protections.

VI. CONCLUSION

Law enforcement efforts would be aided, while individual rights remained protected, if courts were to examine more closely the relationship between incarceration and *Miranda* custody. The current Court has already expressed understandable concern with the view of lower courts that some inmates are rendered question-proof—unapproachable for any questioning—based on an invocation of the right to counsel long ago in regard to charges resolved by the suspect's sentence to a period of incarceration. If courts recognized that most incarceration does not constitute *Miranda* custody and that even a continuously incarcerated inmate will probably experience a break in custody, then these incarcerated suspects could be approached for questioning about new crimes under the well-established rule that a break in custody ends any question-proof status.

The existing additional restraint test for defining custody in prison settings can be used both to expand the opportunities for officials to approach inmates for questioning and also to provide all inmates with substantial protection once they are approached. Thus far, the additional restraint test has been used to find that many inmates are not in custody at the moment they are questioned in prison and can be questioned with no warnings at all. The test would be better used to find that: (1) an inmate may be out of custody for a long period of time before he was approached so that the approach is permissible, notwithstanding an earlier invocation of the right to counsel, but that (2) once approached, an inmate very likely returns to a custodial state and is entitled to be warned or otherwise protected before any questioning. This use of the additional restraint

test for defining custody addresses the societal concern with allowing officials to question long-incarcerated suspects, but also adequately protects the individual's right not to be coerced into giving a statement to overzealous, overbearing officials.

In undertaking this or any other tinkering with the *Miranda* jurisprudence, courts need to keep an eye on the goals of *Miranda*. The chief goal is not to keep people from making confessions when it is not in their own best interest to do so. It is not to prohibit confessions given from guilt, remorse, bravado, or simple foolishness. It is almost always in a suspect's interest not to make a statement without an attorney present. Yet, confessions are often of critical importance in meeting society's expectation and need for crimes to be solved and for the guilty to be punished and rehabilitated. Thus, the confessions to be avoided are those by the innocent or those by the guilty that were not a product of free will. The goal of *Miranda* is not to prevent confessions but to dispel compulsion. It is worth another round of review, to maintain *Miranda*'s delicate balance between society's expectations that crimes be solved and the need to protect the Fifth Amendment rights of all persons, including prison inmates.

If *Miranda* is to be retained and the cost of its prophylactic nature borne, its rules must not be allowed to work absurd results.[240] In explaining where some courts have gone astray in applying *Miranda*'s rules in the prison setting, this Article demonstrates how the rules' original bright-line quality can be maintained without allowing an overly simplistic reading of the rules to produce nonsensical results.

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[240] In discussing the "absurd results" to which some prophylactic rules can lead, one commentator chose as an example the very issue addressed by this Article of whether, under *Edwards v. Arizona*, 451 U.S. 477 (1981), a continuously incarcerated inmate remains question-proof. *See* Dix, *supra* note 16, at 231 & n.114.